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IN THE

Supreme Court of the United States

October Term, 1944.

No. 304

EUGENE DIETZGEN CO.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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APPENDIX.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner, Eugene Dietzgen Co., a Delaware corporation, respectfully prays for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit entered May 22, 1944, modifying, approving and affirming a cease and desist order of the Federal Trade Commission issued against petitioner and others on August 25, 1941, upon a complaint instituted by it on March 29, 1937.

The petitioner, a Delaware corporation having its factory and principal offices in Chicago, Illinois, and within the Seventh Circuit, invoked the jurisdiction of the United States Circuit Court of Appeals for said Circuit by filing

therein on September 22, 1941 its petition to review said cease and desist order pursuant to the provisions of Section 5(c) of the Federal Trade Commission Act. (Chapter 311, Sec. 5, 38 Stat. 717, 719; Sec. 45 Title 15, U. S. C. A.)

On February 29, 1944, said Circuit Court rendered an opinion by Evans, Circuit Judge (reported 142 F. (2d) 321), confirming said cease and desist order, a copy of which said opinion is set forth in the appendix hereto. On March 14, 1944, petitioner filed its petition for rehearing, which was denied by said Court on May 3, 1944. Said Circuit Court on the same day rendered a supplemental opinion (unreported), a copy of which is set forth in the appendix hereto. On May 22, 1944, said Circuit Court entered its final decree substantially the same as the cease and desist order of the Commission (R. 1016).

BASIS FOR THE JURISDICTION OF THIS COURT TO REVIEW THE JUDGMENT IN QUESTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of Congress of February 13, 1925 (U. S. C. A., Sec. 347).

Said decree of the Circuit Court is subject to review by this Court upon certiorari, as provided in Section 347 of Title 28 U. S. C. A. (Sec. 45(g), Title XV U. S. C. A.)

This petition is filed within the time provided by Section 350 of Title 28, U. S. C. A.

SUMMARY OF THE MATTER INVOLVED.

On March 29, 1937, the Federal Trade Commission instituted a complaint against Scientific Apparatus Makers of America (hereinafter sometimes referred to as "SAMA"), its officers and directors, Surveying-Drafting-Coaters Section (hereinafter sometimes referred to as "SDC Section") of the Scientific Apparatus Makers of America, an association, its officers and certain members, separately and as representatives of the other members, purporting to be pursuant to the provisions of the Act of Congress, approved September 26, 1914 entitled "An Act to Create a Federal Trade Commission, to Define its Powers and Duties, and for Other Purposes." The complaint charged that the corporations, the association and the individuals therein described named as respondents, have been and now are using unfair methods of competition in commerce as "commerce" is defined in said Act (R. 1, 2).

The complaint was instituted prior to the amendment of March 21, 1938, which added the words "and unfair or deceptive acts or practices in commerce," but no attempt was made by amendment or otherwise to bring the case within the terms of said amendment to the statute.

The Act prior to said amendment read: "Unfair methods of competition in commerce, are hereby declared unlawful," and this case is controlled by the provisions of the Act as they existed prior to said amendment.

The complaint charged (Par. Seven, R. 6, 7) that:

> "Prior to the formation of the respondent association member respondents Charles Bruning Company, Inc., The Huey Company, The Frederick Post Company, Eugene Dietzgen Company, Inc., and other members of the industry, on or about July 15, 1932, entered

into and thereafter carried out an understanding, agreement, combination and conspiracy for the purpose and with the effect of restricting, restraining, and monopolizing, and eliminating competition in, the sale of blue print paper, and others of the products hereinabove mentioned, in trade and commerce between and among the several states of the United States and in the District of Columbia."

It further charged (Par. Eight, R. 7), that:

"Pursuant to said understanding, agreement, combination and conspiracy, and in furtherance thereof, the said member respondents Charles Bruning Company, Inc., The Huey Company, The Frederick Post Company, Eugene Dietzgen Company, Inc., and the other members of the industry parties thereto, have done and performed and still do and perform the following acts and things:

"1. Agreed to fix and maintain and have fixed and maintained the prices at which said products are sold.

"2. Agreed to fix and maintain and have fixed and maintained uniform terms and conditions for all sales made, including, but without limitation, classification of customers, freight allowances, duration of and optional clauses in contracts.

"3. Agreed to induce and have, through threats, coercion and persuasion, induced members of the industry, not parties to said understanding, agreement, combination and conspiracy, to participate in and cooperate with the parties thereto in carrying out said understanding, agreement, combination and conspiracy.

"4. Agreed to require and have required dealers purchasing said products for resale to consumers to maintain the prices fixed and agreed upon by the respondents.

"5. Agreed to submit and have submitted uniform and identical bids on said products when requests were made for such bids.

"6. Agreed to and have interfered with the source of supply of raw paper of certain members of the industry who did not adhere to the schedule of prices fixed and agreed upon by the said respondents."

It further charged (Par. Nine, R. 7, 8, 9) that:

"Subsequent to the entering into and carrying out of the aforementioned understanding, agreement, combination and conspiracy by the parties thereto, the respondent association was formed by the respondents Scientific Apparatus Makers of America and the member respondents and thereafter, and on or about the 3rd day of June, 1935 and on divers days and dates thereafter, the said respondents entered into and thereafter carried out understandings, agreements, combinations and conspiracies for the purpose and with the effect of restricting, restraining and monopolizing, and eliminating competition in, the sale of blue print paper and the other products described in paragraph three hereof in trade and commerce between and among the several states of the United States and in the District of Columbia. Pursuant to said subsequent understandings, agreements, combinations and conspiracies and in furtherance thereof the said respondents have done and performed and still do and perform the acts and things done and performed pursuant to the understanding, agreement, combination and conspiracy mentioned in Paragraph Eight hereof and do and perform in addition thereto the following acts and things:

"1. Each of the members of the respondent association agreed to and does file with the respondent association a schedule of the prices, including discounts and the terms and conditions of all sales, at which such members will and does sell said products.

"2. Each of said members of respondent association agreed that the prices filed by the respective members could be deviated from only under certain conditions, but agreed that under those conditions they would not and they do not sell at a price less, a discount greater, or on more favorable terms and condi-

tions than those granted by the terms of the price list filed by any other member respondent showing the lowest price, the greatest discount and the most favorable terms of sale.

"3. The respondent association collects from and disseminates among the member respondents information as to prices, discounts and the terms and conditions of sales which enables each of said member respondents to know what prices will be charged by all of the other member respondents. Said member respondents exchange information among themselves in regard to the price discounts and terms and conditions of sale to be submitted by such members when bids are requested.

"4. In many instances the respondents declare the bids requested by purchasers to be 'open,' because some member of the industry bidding in such instances is not a participant in the carrying out of said understandings, agreements, combinations and conspiracies and is selling the products of the industry at prices less than those fixed by the member respondents, and in such cases the member respondents collusively submit identical bids at prices lower than those that would be otherwise submitted so as to prevent such non-participating member of the industry from securing any substantial amount of business and to compel such member to become a party to said understandings, agreements, combinations and conspiracies.

"5. Said member respondents and the respondent association have adopted and agreed upon detailed rules and regulations designed and intended to prevent any deviation on the part of the member respondents from the price fixed and agreed upon as hereinabove alleged.

"6. Said respondents used and are using other methods and means designed to suppress and prevent competition and restrict and restrain the sale of said products in said commerce."

It further charged (Par. Eleven, R. 9) that:

"Said understandings, agreements, combinations and conspiracies, and the things done thereunder and pursuant thereto, as hereinabove alleged, have had and do have the effect of unduly and unlawfully restricting and restraining trade and commerce in said products between and among the several states of the United States and in the District of Columbia; of substantially enhancing prices to the consuming public and maintaining prices at artificial levels and otherwise depriving the public of the benefits that would flow from normal competition among and between the member respondents; of eliminating competition, with the tendency and capacity of creating a monopoly in the sale of said products in said commerce."

The complaint then alleges as a legal conclusion, that:

"Said understandings, agreements, combinations and conspiracies, and the things done thereunder and pursuant thereto, and in furtherance thereof, as above alleged, constitute unfair methods of competition within the intent and meaning of an Act of Congress, approved September 26, 1914, entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' and are to the prejudice of the public." (R. 9, 10.)

No other acts constituting unfair methods of competition in commerce were charged in the complaint. The complaint did not allege the existence, at the time of filing the complaint, of actual or potential competitors of petitioner, or that any member of the industry or his business had been injured or injuriously affected by the acts and conduct of petitioner and other respondents, and no proof was offered as to these matters. In fact, the complaint charged in substance that all competition had been eliminated (Par. Six. R. 5), and the Commission expressly so found (Findings of Fact, Par. 11, R. 819).

SEPARATE ANSWER OF EUGENE DIETZGEN CO. TO SAID COMPLAINT.

On June 15, 1937, the petitioner, Eugene Dietzgen Co., filed its separate answer (R. 12-26) denying all of the material allegations of said complaint, and alleging in substance that it became a member of the Scientific Apparatus Makers Association and the Surveying-Drafting-Coaters Section after the adoption of the National Industrial Recovery Act, upon the invitation of said Association to do so for the purpose of joining with it in applying for and presenting to the President a code of fair competition as authorized by that Act (R. 13); that on or about August 1, 1933, the Association submitted to the President a Code of Fair Competition, and after a hearing before the Administrator the President, by Executive Order, on November 14, 1933, approved the Code (R. 19); that the Manager of the SDC Section required each member of said Section to file a statement of sales policy, including prices, discounts and conditions of sale; that thereafter, on or about March 3, 1934, it filed its list prices, discounts and terms of sale to buyers of blue print paper and cloth and brown print paper and cloth, and on March 14, 1934, filed its list prices, discounts and terms of sale to buyers of drafting room furniture (R. 21), and that the same were approved by the Administrator; that these list prices, discounts and terms of sale were the same or substantially the same as it had established, published and distributed long prior to the adoption and approval of the Code (R. 22, 24, 25).

It alleged that it has never at any time, directly or indirectly, used or engaged in any unfair method of competition in commerce, and is not now engaging in any unfair method of competition in commerce, and that the matters and things alleged in said complaint do not constitute un-

fair methods of competition in commerce (R. 24); that the prices, discounts, terms and conditions of sale filed with the Manager were substantially the same as those published and distributed to its patrons and customers in 1922 during an economic and financial depression in the industry; that the costs of production of said articles have materially increased since 1933, but respondent has at no time increased its prices (R. 25, 26).

Certain Facts Stipulated.

On June 10, 1938, the Commission appointed an Examiner to take evidence. Upon the hearing of evidence before the Examiner petitioner entered into a stipulation as to certain of the facts (R. 133-43). It was stipulated that, subsequent to June 16, 1933 (which was also the date of the enactment of the National Industrial Recovery Act), the SAMA increased its membership, divided its members into sections, (R. 134) and the respondents before the Commission were invited to and did become members for the purpose of joining with said SAMA in applying for and presenting to the President of the United States, through the National Recovery Administration, a Code of Fair Competition for the scientific apparatus industry (R. 135, 136, 137); that on or about August 1, 1933, pursuant to the provisions of said Act, said Association, on behalf of its members, applied for and submitted to the President of the United States a Code of Fair Competition for the scientific apparatus makers industry; that after consideration and hearings thereon, the Administrator made his report to the President, who approved said report and by executive order a Code of Fair Competition for the Scientific Apparatus Industry (R. 136, 137).

> "20. That all the provisions of said Code and Amended Code applied to and governed the conduct of the business of those engaged in producing, selling,

and distributing the products specified therein; and all the members of the industry engaged in said business were by law required to comply with said Code and/or with supplementary Codes containing special provisions pertaining solely to certain Sections, which supplementary Codes were duly approved by said Administrator; and the Eugene Dietzgen Company, did comply with all of the Code provisions, applicable to it." (R. 138.)

"26. That herein filed made a part of the record is a schedule showing the list prices of the principal widths and grades of blue print paper of the Eugene Dietzgen Company prior to, during, and after the termination of the National Industrial Recovery Act, together with the actual selling prices of said products to various classes of purchasers, which is identified and received in evidence as COMMISSION'S EXHIBIT No. 5. *No changes have been made in Eugene Dietzgen Company's prices since the termination of the National Industrial Recovery Act.*" (R. 140.) (Italics supplied.)

"28. That on or about May 27, 1935, the Supreme Court of the United States held that the provisions of the National Industrial Recovery Act, authorizing the President of the United States to issue and promulgate Codes of Fair Competition, were unconstitutional, and shortly thereafter the President of the United States made public request to all members of Codes of Fair Competition theretofore approved by him or by the said Administrator. Herein filed and made a part of the record is a copy of a press report showing said request, which is identified and received in evidence as COMMISSION'S EXHIBIT No. 6." (R. 141.)

In Exhibit 6, the President of the United States made public request of all members of industries subject to codes of fair competition theretofore approved by him, for their continued and voluntary observance of the provisions of said codes.

Donald Richberg, General Counsel and Chairman of the Board of National Recovery Administration, also suggested voluntary code observance (R. 324, 326, 327). Major Berry, who was a Division Administrator of the NRA, arranged a conference for all industries operating under codes, which was held in Washington. At said conference the matter of voluntary code observance was discussed, as well as rewriting the codes for the purpose of clarification (R. 324, 326, 327).

Prior to the date of this Court's decision above mentioned, SAMA had given notice to its members of the annual meeting thereof to be held in Atlantic City, New Jersey, beginning on June 3, 1935. The members of the SDC Section held a meeting at the same time, and the members of SAMA and the members of the SDC Section at their respective meetings gave consideration to the request of the President for continuing voluntary observance of codes by members of industries subject to their provisions (Ex. 6, R. 141; Roberts, R. 324, 325, 326, 327).

At the meeting of the members of the SDC Section there was a full discussion of the situation and the members voted to continue code observance, except as to paragraph 12 of the Supplementary Code identified in the record as Commission's Exhibit 4. Said paragraph related to price filing and provided that a member should not sell his product lower than his filed prices, except to meet some lower price filed by other members. As to said paragraph 12 it was voted to refer the matter to the executive committee of the Section for re-writing in legal form and subsequent submission to the Section (Stip. Par. 29, R. 141-142).

As a result of the activities of SAMA and the SDC Section, taken at the request of the President and other representatives of the Government, SAMA submitted to all

of its members, through its various sections, a proposed code for the industry which has been identified and received in evidence as Commission's Exhibit 8 (Stip. Par. 30, R. 142).

The proposed code was submitted to the members for their action, criticisms and suggestions (Roberts, R. 327).

The proposed code, Exhibit 8, was by the board of directors of SAMA sent to the members of the SDC Section and was fully discussed at a meeting of the Section held at Cleveland on October 29, 1935. Certain modifications or changes were proposed as shown in Exhibit 9, and as so changed the Section gave a vote approving the recommendation thereof as satisfactory to the Section (Stip. Par. 30, R. 142, Ex. 9).

Parker, Secretary and Manager of the Section, testified that the matter of a code was in tentative form and the members (of the Section) present were simply trying to state to the Board of Directors of the SAMA what would be a satisfactory code for the Section and were not entering into an agreement at that time (R. 554).

Exhibit 10 is a copy of the minutes of the meeting of the Section, held at Cleveland on October 29, 1935.

The proposed code as amended and as so recommended and approved by the SDC Section as satisfactory to it, has been received in evidence and is identified in the record as Exhibit 9 (Stip. Par. 30, R. 142).

At a meeting of the members of the SDC Section held at Chicago on June 1, 1936 (Ex. 11, Minutes of Meeting; Stip. Par. 31, R. 143, 144) certain rules of fair competition identified and received in evidence as Exhibit 11-A were approved as satisfactory to said Section (Stip. Par. 31, R. 143, 144).

The practices designated unfair and as destructive of

the industry as set forth in Section 3 of Article II of and Exhibit 11-A were prepared, submitted and recommended by Mr. Arthur Fisher, who was then attorney for SAMA (Parker, R. 551, 552). At least Sub-section 3.1 of Section 3 of Article II of Exhibit 11-A was recommended by Mr. Fisher. It is the one relating to selling and price filing (Parker, R. 551, 552; Keller, R. 501, 502).

Sub-section 3.1 aforesaid was a modification of paragraph 12 of the Supplementary Code (Exhibit 4) which was abandoned at the Atlantic City meeting of June 3, 1935 with directions to the executive committee to revamp or reform the same and as so reformed or modified to be submitted at a meeting of the SDC Section. The meeting in Chicago on June 1, 1936 was the first meeting at which the modification of paragraph 12 of the Supplementary Code (Exhibit 4) was submitted for the consideration of the Section and it was approved in the form of Sub-section 3.1 of Section 3 of Article II of Exhibit 11-A. Exhibit 11-A was never approved by the board of directors of SAMA (Stip. Par. 31, R. 142, 143). This statement is also confirmed by Mr. Roberts, the president of SAMA (R. 348).

Petitioner Resigned From SAMA and SDC Section March 4, 1938.

On March 4, 1938, nearly three and a half years before the Commission made its findings of fact and entered its cease and desist order, the petitioner resigned as a member of Scientific Apparatus Makers of America and as a member of Surveying-Drafting-Coaters Section (Par. 8, Examiner's Revised Report, R. 770).

McDonald Testimony.

In the course of the hearing before the Examiner, counsel for the Commission called as a witness one McDonald, who was an investigating agent of the Commission and who had been authorized to make an investigation for information that might show violations of the Federal Trade Commission Act or for information or documents that might show no violations thereof (R. 458). Petitioner objected to his testimony, and also to said exhibits which he had obtained from the files of other respondents and moved to strike the same from the record. Upon cross-examination it appeared that at the time the witness McDonald obtained the papers and documents included in Exhibits 155 to 159 inclusive, he also obtained other correspondence and documents bearing on the nature of his investigation which he had delivered to the Commission and which were then in its possession (R. 459).

Counsel for petitioner called upon counsel for the Commission to produce such additional documents as the witness had obtained from said files, which counsel for the Commission refused to do. Upon the refusal of the witness, as well as counsel, to produce the additional documents obtained by the witness, the motion to strike said exhibits was again renewed (R. 459). The Commission later overruled petitioner's written motion to strike the exhibits in question, which was based upon the ground that the Commission was withholding evidence favorable to petitioner and other respondents and which the attorney for the Commission declined to produce, without giving petitioner an opportunity for argument on said written motion (R. 97-102).

It further appeared that these favorable documents, or copies thereof, were not available to any of the respondents

because they had been taken from the files of certain of the respondents and no copies thereof remained in their said files (R. 451-57, 298, 313, 314, 315).

Motions by Petitioner.

On December 1, 1939, the petitioner, Eugene Dietzgen Co., made a motion before the Commission to strike from the record all testimony offered by the Commission alleging, among other things, that the charges in the complaint, if true, would constitute understandings, agreements, combinations and conspiracies in violation of the Sherman Act, fully completed and existing at the time of the institution and service of the complaint; that the Commission is an administrative body without jurisdiction to consider, pass upon or determine violations of the Sherman Act, or to enforce or administer its provisions (R. 97-102).

On the same day (December 1, 1939) petitioner moved to enter an order of dismissal for the reason that the Commission has no power or jurisdiction to institute a complaint against or to determine the existence of any agreement, understanding, combination or conspiracy in restraint of trade, in violation of the anti-trust laws; that the complaint does not charge those respondents with the doing of acts that constitute unfair methods of competition in violation of the Federal Trade Commission Act (R. 102-103).

On December 12, 1939, said motions to strike and to dismiss were denied by the Commission (R. 104-105).

Further Proceedings.

At the conclusion of the hearing before the Examiner he made a report (R. 660-678) to which petitioner filed exceptions (R. 678-708).

The Examiner then made a revised and supplemental report (R. 767-785), to which petitioner filed exceptions (R. 786-789).

On August 25, 1941, the Commission made findings of fact (R. 811-825) and entered a cease and desist order (R. 826-829).

The Federal Trade Commission dismissed the complaint as to the Scientific Apparatus Makers of America. Petitioner then filed, in the Circuit Court of Appeals for the Seventh Circuit, its petition for review (R. 830-849), together with its statement of points (R. 850-860).

On November 19, 1941, petitioner filed an amendment to its petition for review (R. 861-865) and an amendment to its statement of points (R. 866-870).

Certain Charges in Complaint Not Sustained by Commission.

Neither the Examiner in his report or revised report, nor the Commission in its findings of fact, made any findings sustaining the following charges in the complaint:

(1) That any of said respondents used any threats or coercion;

(2) That they agreed to require, and have required dealers purchasing said products for resale to consumers to maintain prices fixed and agreed upon by the respondents;

(3) That they agreed to and have interfered with the source of supply of raw paper of certain members of the industry who did not adhere to the schedule of prices fixed and agreed upon by said respondents;

(4) That "In many instances the respondents declare the bids requested by purchasers to be 'open', because some

member of the industry bidding in such instances is not a participant in the carrying out of said understandings, agreements, combinations and conspiracies and is selling the products of the industry at prices less than those fixed by the member respondents, and in such cases the member respondents collusively submit identical bids at prices lower than those that would be otherwise submitted so as to prevent such non-participating member of the industry from securing any substantial amount of business and to compel such member to become a party to said understandings, agreements, combinations and conspiracies" (R. 815-825).

(5) "Said member respondents exchange information among themselves in regard to the price discounts and terms and conditions of sale to be submitted by such members when bids are requested."

(6) "Said respondents used and are using other methods and means designed to suppress and prevent competition and restrict and restrain the sale of said products in said commerce."

QUESTIONS PRESENTED.

1. Whether the Commission had jurisdiction to proceed under said complaint and to make a valid cease and desist order thereon.

2. Whether the complaint alleged facts constituting unfair methods of competition in commerce within the meaning of Section 5 of the Federal Trade Commission Act.

3. Whether the Federal Trade Commission has jurisdiction and power under the Federal Trade Commission Act,

(a) To file a complaint alleging the existence and continuance of complete understandings, agreements, combinations and conspiracies in restraint of trade in commerce, the elimination of competition, and the creation of monopoly, which allegations, if true, would constitute violations of the civil and criminal provisions of the Sherman Act (R. 5, 6, 8);

(b) To hear and determine the existence and continuance of said complete understandings, agreements, combinations and conspiracies in restraint of trade in commerce, resulting in the elimination of competition and the creation of a monopoly constituting violations of the Sherman Act, which would require the exercise by this administrative body of complete judicial power;

(c) After the determination of the matters set forth in sub-paragraph (b) above, to then declare by fiat that said matters constitute unfair methods of competition in violation of the Federal Trade Commission Act (R. 825);

(d) Upon said determination and declaration, to then enter an order in complete injunctive form restraining petitioner and other respondents before the Commission from carrying out said agreements, understandings, combinations and conspiracies, and from doing in furtherance thereof any of the acts and things

specified in said order (R. 827, 828, 829, 1016, 1017, 1018);

(e) To exercise the jurisdiction and power to restrain full, complete and existing violations of the Sherman Act, which vests exclusive jurisdiction and power in the district courts to enjoin such violations of said Act (R. 827, 828, 829, 1016, 1017, 1018).

4. Whether the Commission had power or jurisdiction to make the cease and desist order in the absence of any evidence in the record to show that any competitors of petitioner, actual or potential, or their business, were in any manner injured or their business injuriously affected by any act or acts of the petitioner.

5. Whether the Commission had power or jurisdiction to make the cease and desist order because the same, and its findings of fact, are not supported by lawful evidence and are contrary to the undisputed evidence of record before the Commission.

6. Whether the acts of the petitioner subsequent to the decision of this Honorable Court in *Shechter Poultry Corporation* v. *United States*, 295 U. S. 495, pursuant to the request of the President of the United States that the parties continue voluntarily to observe said Codes, in continuing to adhere to its prices and discounts which it had theretofore filed with the Code Administrator as required by the provisions of the National Industrial Recovery Act, constituted a violation of the Sherman Anti-Trust Act.

7. Whether Section 4(a) (Appendix p. 19) of the National Industrial Recovery Act (48 Stat., Ch. 90, 195) authorized the President to make the request (Exhibit 6) to members of all industries having codes to continue voluntary observance thereof, and if so, whether the petitioner and other members of the industry, in complying with said request, violated the provisions of the Sherman Act.

8. Whether the acts of the petitioner subsequent to the decision of this Court in *Shechter Poultry Corporation* v. *United States*, 295 U. S. 495, in continuing to adhere to its prices and discounts which it had theretofore filed with the Code Administrator under and pursuant to the provisions of the National Industrial Recovery Act, constituted an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

9. Whether the provisions of Section 3.1 of Article II of the "Rules of Fair Competition" for the SDC Section (Exhibit 11a) constitute a violation of the Sherman Act, or an unfair method of competition contrary to the provisions of Section 5 of the Federal Trade Commission Act.

10. Whether the Commission has the power to introduce in evidence over the objections of petitioner certain correspondence and documents, procured in its investigation of the files of other respondents before the Commission, and then refuse, upon the demand of petitioner, to produce other correspondence and documents pertaining to the same matters which were obtained by it from the files of such other respondents at the same time in the same investigation, and which were not available to petitioner from any other source, and whether such refusal deprived petitioner of a fair hearing under Section 5(b) of the Federal Trade Commission Act and constituted a denial of due process in violation of the Fifth Amendment to the Constitution of the United States.

Each of the foregoing questions was raised and presented to the Federal Trade Commission, and to the Circuit Court of Appeals.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The Circuit Court of Appeals in this case has decided an important question of Federal law which has not been but which should be settled by this Court. This question is whether the Federal Trade Commission has jurisdiction and power, under the Federal Trade Commission Act,

(a) To file a complaint alleging and charging the existence and continuance of full and complete understandings, agreements, combinations and conspiracies in restraint of trade in commerce, the elimination of competition and the creation of monopoly, which allegations, if true, would constitute violations of the civil and criminal provisions of the Sherman Act (R. 5, 6, 8);

(b) To hear and determine the existence of full and complete understandings, agreements, combinations and conspiracies in restraint of trade in commerce, resulting in the elimination of competition and the creation of a monopoly constituting violations of the Sherman Act which would require the exercise by this administrative body of complete judicial power which it does not possess (R. 823, 825);

(c) After the determination of the matters set forth in subparagraph (b) above, to then declare by fiat that said matters constitute unfair methods of competition in violation of the Federal Trade Commission Act (R. 825);

(d) Upon said determination and declaration, to then enter an order in complete injunctive form restraining petitioner and other respondents before the Commission from carrying out said agreements, understandings, combinations and conspiracies, and from doing in furtherance thereof any of the acts and

things specified in said order (R. 827, 828, 829, 1016, 1017, 1018);

(e) To exercise the jurisdiction and power to restrain full, complete and existing violations of the Sherman Act which vests exclusive jurisdiction and power in the district courts to enjoin such violations of said Act (R. 827, 828, 829, 1016, 1017, 1018).

This vitally important question, going to the very foundation of the jurisdiction and power of the Federal Trade Commission in a case of this character, has never been presented to or decided by this Court in any prior case.

II.

The Circuit Court in this case has decided a Federal question in a way probably in conflict with applicable decisions of this Court, to-wit:

(a) The decision of the Circuit Court, that

> "Our conclusion is that instead of its being a ground for denying jurisdiction of the F.T.C., the fact that the acts complained of, violate the criminal section of the Sherman Anti-Trust Act, affords a legitimate basis of action by the said Commission"

appears to be in conflict with the decisions of this Court in the following cases, which hold that the Commission has no power to enforce the provisions of the Sherman Act, or to determine violations thereof:

Federal Trade Commission v. *Eastman Kodak Company*, 274 U. S. 619, 623, 624.

Arrow-Hart & Hegeman v. *Federal Trade Commission*, 291 U. S. 587, 599.

Thatcher Mfg. Co. v. *Federal Trade Commission*, 272 U. S. 554, 556, 561.

Federal Trade Commission v. *Raladam*, 283 U. S. 643, 647, 654.

(b) The decision of the Circuit Court appears to be in conflict with the decisions of this Court in the following cases, which hold that the Federal Trade Commission is only an administrative agency and that it and similar administrative bodies are not possessed of Federal judicial power:

Federal Trade Commission v. *Eastman Kodak Company*, 274 U. S. 619, 623, 624.

Union Bridge Co. v. *United States*, 204 U. S. 364, 386, 387.

Monongahela Bridge Co. v. *United States*, 216 U. S. 177, 190, 192.

Interstate Commerce Commission v. *Northern Pacific Railway Company*, 222 U. S. 541, 547, 548.

Interstate Commerce Commission v. *Louisville & Nashville Railroad Co.*, 227 U. S. 88, 90, 93.

(c) The decision of the Circuit Court appears to be in conflict with the following decisions of this Court, which hold that neither the Federal Trade Commission, nor any other administrative agency, has the power to enforce laws the administration of which is specially confided to another governmental agency, or to a court, or to determine violations of such other laws:

Brougham v. *Blanton Mfg. Co.*, 249 U. S. 495, 499, 500.

Federal Trade Commission v. *Raladam Co.*, 283 U. S. 643, 649.

Keogh v. *Chicago & Northwestern Railroad Company*, 260 U. S. 156, 162.

(d) The decision of the Circuit Court appears to be in conflict with the decisions of this Court in the following cases, which hold that the Commission should move before

the agreements, understandings, combinations, conspiracies, restraints or monopolies are completed:

Fashion Guild v. *Federal Trade Commission,* 312 U. S. 457, 464.

Federal Trade Commission v. *Raladam,* 283 U. S. 643, 645, 647, 655.

Federal Trade Commission v. *Raladam,* 316 U. S. 149.

Arrow-Hart & Hegeman Electric Co. v. *Federal Trade Commission,* 291 U. S. 587, 599.

III.

The Circuit Court in this case has decided a Federal question in a way probably in conflict with applicable decisions of this Court. The Circuit Court decided that:

> "Hardly worthy of serious or extended consideration is petitioners' urge that the order should be set aside because no competitor was hurt by the practices and agreements. To carry this contention to its logical conclusion would necessitate denial to the Commission of jurisdiction to deal with any price fixing agreement to which all in the industry have subscribed. In other words, if this contention were accepted, it would only be when one or more competitors are left out or refuse to subscribe to the price-fixing agreement that the Federal Trade Commission could intervene. This would defeat the purpose of the Act. Price fixing usually results in price raising. That, and the elimination of price cutting, are the objects of such agreements. It is not often that any competitor in the industry is hurt by an agreement which raises the prices or an agreement which prevented the cutting of prices. The ordinary and necessary result would be financial advantage, at least temporary advantage to all in the industry. But it would not be to the advantage of the public or to the users of the commodities whose prices are fixed.

"'Unfair methods of competition' are not determined by so narrow or one-sided a test. It is the harm, which results from destroying the '*fair opportunity*' for competition among competitors which results from a price fixing agreement, created and established by such combination, that makes the action unfair as that term is used in the Act. It is the restriction on the play of competition under normal conditions that presents a case of 'unfair method of competition.' (*F. T. C.* v. *Pacific Paper Assn.*, 273 U. S. 52; *Cal. Rice Industry* v. *F. T. C.*, 102 F. 2d 716, 722.)" (Appendix, p. 7.)

In so holding, the Circuit Court has decided a Federal question in conflict with the following applicable decisions of this Court:

Federal Trade Commission v. *Raladam*, 283 U. S. 643, 645, 647, 654.

Federal Trade Commission v. *Raladam*, 316 U. S. 149.

IV.

The Circuit Court in this case has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

The Circuit Court, by its decision condemning open price filing and the rules of fair competition and particularly Sub-section 3.1 of Section 3 of Article II of Exhibit 11-A, which follows the statement "The practices described below are declared to be unfair and destructive to industry welfare":

"3.1. Sell, or offer to sell, directly or indirectly, any product of the Section on which price information had been published, at less than the lowest net price published by any member on such product or products; nor sell, or offer to sell, products which are not covered by such price lists but which are similar to listed

> products, at net prices more favorable to the purchaser than the lowest published net price'." (Stip. Par. 31, R. 143.)

and in holding that the same was contrary to the provisions of the Sherman Act (Appendix, p. 9), is in conflict with the decision of this Court in *Sugar Institute* v. *United States*, 297 U. S. 553, and especially that part of the opinion appearing on page 601.*

V.

That the Circuit Court of Appeals has so far sanctioned the departure from the accepted and usual course of judicial proceedings by the Federal Trade Commission in depriving petitioner of a full hearing as required by Section 5 of the Federal Trade Commission Act as to call for an exercise of this Court's power of supervision.

At the hearing before the Commission, it called as a witness Donald R. McDonald, who was an examining agent in its employ, and his testimony given on direct as well as in cross-examination appears in the record on pages 449 to 466, inclusive.

Exhibit 155 (R. 452), Exhibit 156 (R. 454), Exhibit 157 (R. 455), Exhibit 158 (Rec. 455), and Exhibit 159 (Rec. 455, 456) identified by said witness, were received in evidence over the objection of petitioner. The letters and

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* In the opinion of the Circuit Court (Appendix, p. 9) the Court purports to quote the language of the "Rules of Fair Competition" as follows:

> "Sell, or offer to sell, products on which price information has been filed and published at less than the lowest net price filed and published by any member on such product or products: nor sell, or offer to sell, special products which are not covered by his filed and published price list, at net prices more favorable to the purchaser than the lowest filed and published net price of a similar item of comparable grade."

The foregoing language quoted by the Court is in fact the proposed section 4.1 of Article II of the proposed code, Exhibit 8, for the entire industry and as modified by the same section in Exhibit 9. The provision so quoted was never adopted but was only a suggestion, and this fact is conceded by the Commission at page 29 of its brief in the Circuit Court of Appeals.

documents covered by these exhibit numbers were copies of originals which could not be found or produced (Statement by Thomerson, attorney for the Commission, R. 456). The witness stated (R. 458) that in examining the files of such other respondents they undertook to obtain such information as might show the violation of any of the provisions of the Federal Trade Commission Act; *and in addition thereto, such information or documents as might show no violation.*

He further testified that he obtained copies of other letters and documents from the files in question that bore on the nature of the investigation that were then in the possession of the Commission (R. 458, 459).

Upon petitioner's request that the Commission produce such other correspondence obtained by said agent, its production was refused by the attorney for the Commission, petitioner's motion therefor overruled, and its motion to strike said exhibits was likewise overruled (R. 457, 459, 460, 462).

Petitioner before the Commission contended that the Commission's refusal to furnish such additional correspondence and documents from the files of the Commission and which was the only source from which they could be obtained, as the originals of said letters and documents had been lost or destroyed (*Post*, R. 298, 313, 314, 315; Thomerson, R. 456), and the overruling of said motion to produce as well as its motion to strike said exhibits from the record deprived petitioner of the full and complete hearing required by Section 5 of the Federal Trade Commission Act (R. 97-102).

The same contentions were made before the Circuit Court of Appeals (R. 842), coupled with the additional contention that deprivation of said hearing as contemplated by said section of the statute denied the petitioner due process

of law, in violation of the Fifth Amendment to the Constitution of the United States (Brief Point IX, pp. 57, 93, 94, 95).

The Circuit Court of Appeals did not pass upon the question so presented to it, and thus sanctioned the action of the Commission. The refusal of said Court to pass upon said question appears to be in conflict with the decisions of this Court in *Interstate Commerce Commission* v. *Louisville & Nashville Railroad*, 227 U. S. 88, 90, 91, 92, 93; *Morgan* v. *United States*, 298 U. S. 468, 479, 480; *Morgan* v. *United States*, 304 U. S. 1, 18, 19.

Said action of the Circuit Court of Appeals in refusing to pass upon the above question presented to it is in conflict with the decision in *Powhattan Mining Company, et al.* v. *Ickes*, 118 Fed. (2d) 108, 109.

VI.

The Circuit Court of Appeals in this case has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter,

(a) The decision of said Court that

> "our conclusion is that instead of its being a ground for denying jurisdiction of the F. T. C., the fact that the acts complained of, violate the criminal section of the Sherman Anti-Trust Act, affords the legitimate basis of action by the said Commission." (Appendix, p. 7.)

appears to be in conflict with the decisions of circuit courts of appeal in other circuits cited below, which hold that the Commission is merely an administrative body without judicial power, not a court, and has no jurisdiction or power to enforce the provisions of the Sherman Act or to determine violations thereof:

Butterick Pub. Co., et al. v. *Federal Trade Commission* (2nd Cir.), 85 Fed. (2d) 522, 525, 526.

American Tobacco Company v. *Federal Trade Commission* (2nd Cir.), 9 Fed. (2d) 570, 586.
Eastman Kodak Co., et al. v. *Federal Trade Commission* (2nd Cir.), 7 Fed. (2d) 594, 595, 596.

(b) The decision of said Court appears to be in conflict with the decisions of circuit courts of appeal in other circuits covering the same matter, cited below, which hold that the Federal Trade Commission does not have the jurisdiction or power to enforce laws the administration of which is specially confided to some other governmental agency or to a court, or to determine violations of such other laws:

United Corporation v. *Federal Trade Commission*, (4th Cir.) 110 Fed. (2d) 473, 475.
Chamber of Commerce v. *Federal Trade Commission*, (8th Cir.) 13 Fed. (2d) 673, 685.

(c) The failure of this Court to pass upon the refusal of the Commission to produce and make a part of the record the additional correspondence and documents obtained by its agent McDonald and delivered to the Commission and then in its possession, on the ground that the same were confidential (R. 459), appears to be in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Powhatan Mining Co., et al.* v. *Harold Ickes*, reported in 118 Fed. (2d) 105, 108, 109, which holds that the failure and refusal of the Bituminous Coal Commission or its subordinates to produce at the hearing before it and make a part of the record pertinent data in its possession based on confidential information received by it, did not accord a full hearing as required by the statute, and constituted lack of due process.

(d) The action of said Court as outlined in sub-paragraph (c) above is in conflict with the decision of the Cir-

cuit Court of Appeals for the Ninth Circuit in *California Lumberman's Council* v. *Federal Trade Commission,* 103 Fed. (2d) 304, 305, which holds that if petitioners have been deprived of a fair trial the order of the Commission is invalid as violative of due process.

Wherefore, the petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send up to this Court, on a day to be designated therein, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this case, including the original exhibits filed before the Commission, to the end that this case may be reviewed and determined by this Court; that the decision of said Circuit Court of Appeals and the decree of said Court of May 22, 1944 be reversed, and the complaint of the Federal Trade Commission dismissed; and that your petitioner may be granted such other and further relief as may seem proper.

Respectfully submitted,

Eugene Dietzgen Co., *Petitioner,*
By Arthur M. Cox,
231 South LaSalle St.,
Chicago, Illinois.

William E. Lamb,
Munsey Building,
Washington, D. C.
Its Attorneys.

APPENDIX.

OPINION OF THE CIRCUIT COURT OF APPEALS.

Nos. 7791, 7820, 7821, 7828.

October Term, 1943, January Session, 1944.

February 29, 1944.

Before EVANS and MAJOR, *Circuit Judges* and LINDLEY, *District Judge.*

EVANS, *Circuit Judge.* Four petitioners, Eugene Dietzgen Co., Keuffel & Esser Co. and Karl Keller, Charles Bruning Co., and C. F. Pease Co., seeking a review of an order of the Federal Trade Commission directing them and others to cease and desist from an alleged conspiracy to fix and maintain prices. Petitioners manufacture and sell scientific drafting and related instruments and materials.

The chief controversies are over: (1) The sufficiency of the evidence to support the findings of the Commission that there existed a conspiracy to fix prices; (2) The insufficiency of the evidence to support the order as entered, in view of the contention that most of the evidence had to do solely with blue print paper, whereas the order extends to many other products; (3) The jurisdiction of the Federal Trade Commission to enter a cease and desist order where the alleged illegal practice is a violation of the Sherman Act and cognizable thereunder. Such action is allegedly not cognizable under the F. T. C. Act as an "unfair practice"; (4) The failure of evidence to show any injury to any competitor, allegedly a prerequisite to F. T. C. jurisdiction.

Respondent contends that the conspiracy as charged, began in the summer of 1932 and continued thereafter,

save for the period of June 16, 1933 to May 27, 1935 when the N. R. A. Codes were in force. When the N. R. A. was declared unconstitutional in part, the agreement of these competitors again became illegal. This was in 1935 and the unlawful agreement or conspiracy continued thereafter. For sake of clarity, the important dates of this case are set forth chronologically in the margin.*

Some of the competitors engaged in this business, first associated together in a trade organization in April, 1919. This same organization incorporated in January, 1936, and was known as the Scientific Apparatus Makers of America, hereinafter referred to as SAMA. Its members manufactured or sold so many products that sub-associations, called sections, were formed, one being the Surveying-Drafting-Coaters Section, hereafter called the SDC Section, which section had forty members, among them the petitioners here involved. Most of the acts complained of were fostered and effected through this organization, with whom price lists were filed and at whose meetings the alleged agreements were reached for adherence to the prices filed.

The Federal Trade Commission filed its complaint against petitioners and many others, March 29, 1937, after which answers and motions to dismiss were filed. An extended hearing was had, stipulations between three of pe-

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* April, 1919 SAMA organized (not incorporated).

June or July, 1932 Representatives of seven manufacturers met at Hotel Statler in Detroit and allegedly agreed to adhere to certain price lists (beginning first conspiracy).

June 16, 1933 N. R. A. enacted.

June, 1933 S. D. C. Section of SAMA formed and SAMA enlarged membership and scope of activities.

July 28, 1933 Entered into reemployment agreement with President (Code prices under N. R. A.)

August 1, 1933 Code under N. R. A. submitted.

November 14, 1933 Code under N. R. A. approved by President.

Jan. 3, 1935 Schedule of prices filed with SAMA.

May 27, 1935 Supreme Court held N. R. A. partially unconstitutional and President immediately asked for voluntary compliance.

June 3, 1935 Meeting at Atlantic City (beginning of alleged second conspiracy).

Oct. 29, 1935 Meeting at Cleveland.

Jan. 20, 1936 SAMA incorporated in Illinois.

May 18, 1936 Identical bids to New York State.

June 1, 1936 Chicago meeting.

March 29, 1937 F. T. C. Complaint.

March 4, 1938 Dietzgen resigned from SAMA.

August 25, 1941 F. T. C. cease and desist order.

titioners and the F. T. C. were filed, and the F. T. C. made findings and a conclusion, and entered the cease and desist order here complained of, August 25, 1941.

The Federal Trade Commission found that representatives of seven to ten manufacturers met at Detroit in June or July, 1932, and agreed on a price list to become effective July 10, 1932, which price list Dietzgen had prepared, and which was "substantially higher than the demoralized prices at which sales were being made in Detroit at the time of this meeting." It also found that petitioners complied with the N. R. A. Code prices from November, 1933, to May 27, 1935, when the Supreme Court declared the pertinent part of the Act unconstitutional. In June of that year, the petitioners' representatives again met and agreed to keep the N. R. A. Code prices in effect, and in late October, 1935, they again met at Cleveland and concluded it was unfair to sell for less than the lowest published price of any member.** A Chicago meeting of June 1, 1936 came to the same agreement.*** The Commission found

** "At this meeting rules of fair competition were adopted by unanimous vote of the members present, which, among other things, makes it unfair practice to:

" 'Sell, or offer to sell, products on which price information has been filed and published, at less than the lowest net price filed and published by any member on such product or products; nor sell, or offer to sell, special products, which are covered by his filed and published price lists, at net prices more favorable to the purchaser than the lowest filed and published net prices for a similar item of comparable grade.'

" 'To offer to consumers more favorable to them than "Net 30 days", nor more favorable terms to dealers than "2% cash discount on the 10th prox." '

" 'To take contracts for a period of more than one year, or allow options for an additional period or additional quantity of merchandise.' "

*** "The practices described below were declared to be unfair and destructive to Industry welfare:

> " 'Sell, or offer to sell, directly or indirectly, any product of the Section on which price information had been published, at less than the lowest net price published by any member on such product or products; nor sell, or offer to sell, products which are not covered by such price lists but which are similar to listed products, at net prices more favorable to the purchaser than the lowest published net price.'

"These rules also provide that:

> " 'No member shall quote a lump-sum price on any schedule of products of this Industry which does not itemize, or which is lower than, the sum of such member's unit selling prices of the articles comprising the schedule; and when quoting a combined bid, including purchased materials, no member shall quote prices for such purchased material less than the published resale price of the manufacturer thereof applicable to the trade factor making the purchase. Any adjustment for units withdrawn must be at quoted prices.' "

that prior to the Detroit meeting all petitioners were in substantial competition with each other, but such competition then ceased. The findings cite the fact that a majority of the eleven SDC section members submitted identical governmental bids in 19 instances, in sums varying from $3,441.20 to $34,095.50, and that mere coincidence or happenstance could not account for such constantly recurring and universality of identity.

The bids (by many members of the SDC Section) were made:

(1) To the State of New York, on May 18, 1936, in the sum of $18,721.48*, the members including Dietzgen, Keuffel, Bruning, and Keystone;

(2) To the Navy, in May, 1936, on nine separate lots, in which the bids were for thousands of dollars, and in which Dietzgen submitted identical bids with other members, on all nine lots; Keuffel and Pease, on eight of the nine lots; and Bruning on six of the lots;

(3) To the Navy, on July 1, 1937, there were eight lots in which identical bids of thousands of dollars were submitted by members, including Dietzgen's bid on all eight lots, Keuffel's bid on two lots, and Bruning on seven lots.

The conclusions which the F. T. C. drew from these identical bids were:

"While the illustrations above set out relate to reproduction papers only, the evidence establishes the same uniformity of prices on the other items sold by the respondents.

"Bids substantially identical in all instances and identical to the penny in most instances on various types of reproduction paper, where the quantity involved in the several lots ranges from $3,441.20 to $34,095.50, are not the result of a uniformity of the cost of production as contended by respondents but are the result of concerted action on the part of the respondents, as hereinabove found."

The F. T. C. reached the conclusion that a conspiracy was formulated (and later carried out) at the four meetings

* Keystone bid, $18,722.23.

of the SDC Section and SAMA, held first in June, 1932, at Detroit, the second meeting at Atlantic City, in June, 1935, the third, in Cleveland, October, 1935, and the fourth, at Chicago, in June, 1936. Petitioners Bruning and Dietzgen attended all four of these meetings, Keuffel attended the second and fourth meetings, and Pease attended all but the first meeting.

Additional defenses to those outlined in the issues above stated are raised: *i. e.*, the agreements as to price fixing, reached at the meetings of the Association never became effective and binding because never approved in accordance with the Association's rules. Dietzgen states it merely submitted its price list, in the first instance, somewhat like a declaration of policy that it was not participating in the then existing price war, and that it would not sell at prices which were below cost. Dietzgen also contends that since it resigned from SAMA on March 4, 1938, there was no need, as to it, for a cease and desist order, promulgated some three years after its resignation. Finally it is argued by petitioners that there was no injury to other competittors alleged or shown.

At the conclusion of the hearing before the Trial Examiner, extended and specific findings of fact were made which were assailed before the Commission and that body also made findings of fact and a conclusion which read

> "Said understandings, agreements, combinations and conspiracies, and the things done thereunder and pursuant thereto and in furtherance thereof, as hereinabove found, constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act."

The order which was entered directed the respondents to cease and desist from "fixing and maintaining, or agreeing to fix and maintain the prices at which said products will be sold by them." It directed Section SDC and certain members of the Executive Committee to cease and desist from "Directly or indirectly, jointly or severally, entering into or carrying out any understanding * * to * * suppress competition * *" or "aiding and assisting the members of said respondent association in carrying out

or engaging in any of the acts and practices hereinbefore set forth * *."

It dismissed the complaint as to the respondent Scientific Apparatus Makers of America, its officer and directors, and respondents Carl S. Hallauer, R. E. Gillmor and John M. Roberts for want of evidence sufficient to establish the charges set forth in the complaint.

There were many respondents who were either members of the Association or particular individuals who opposed this relief, but all acquiesced in the order save only the petitioners here, four in number.

Jurisdiction of the F. T. C. to Issue Cease and Desist Order against Activity within Purview of Sherman Act. The contention most seriously pressed by some though not all petitioners, to avoid the cease and desist order is the lack of power in the Federal Trade Commission to control a conspiracy to fix prices and create a monopoly, which admittedly could be reached under the Sherman Act. Or, stated differently, since this is a monopolistic conspiracy and within the scope of the Sherman Act, it should not be deemed to be an "unfair method of competition" and within the scope of the F. T. C.'s jurisdiction.

This argument is not a new one. It has been frequently advanced and text writers have dealt with and rejected it.*

We are satisfied that the F. T. C. was clearly within its jurisdiction in entering this order to cease price restrictions, provided the evidence sustained the charge. The Supreme Court has held that a method of price fixing, subject to criminal prosecution, under the Sherman Act, is also prohibitable under the F. T. C. Act. Likewise, its holding is unequivocal, that where parties dominate an industry and effect a price fixing agreement, such price fixing agreement is an "unfair method of competition." In the margin we quote from several of its decisions.**

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* Federal Trade Law and Practice, Henry Ward Beer, published in 1942, page 93, *et seq.;* Henderson, Federal Trade Commission, Chapter I.

** "If the purpose and practice of the combination of garment manufacturers and their affiliates runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition. From its findings the Commission concluded that the petitioners, 'pursuant to under-

Our conclusion is that instead of its being a ground for denying jurisdiction of the F. T. C., the fact that the acts complained of, violate the criminal section of the Sherman Anti-Trust Act, affords a legitimate basis of action by the said Commission.

No Competitor Was Hurt. Hardly worthy of serious or extended consideration is petitioners' urge that the order should be set aside because no competitor was hurt by the practices and agreements. To carry this contention to its logical conclusion would necessitate denial to the Commission of jurisdiction to deal with any price fixing agreement

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standings, arrangements, agreements, combinations and conspiracies entered into jointly and severally' had prevented sales in interstate commerce, had 'substantially lessened, hindered and suppressed' competition, and had tended 'to create in themselves a monopoly.' * * it was the object of the Federal Trade Commission Act to reach not merely in their fruition but also in their incipiency combinations which could lead to these (price fixing combinations) and other trade restraints and practices deemed undesirable. * * While a conspiracy to fix prices is illegal, an intent to increase prices is not an ever-present essential of conduct amounting to a violation of the policy of the Sherman and Clayton Acts; a monopoly contrary to their policies can exist even though a combination may temporarily or even permanently reduce the price of the articles manufactured or sold." *Fashion Guild* v. *Trade Commission*, 312 U. S. 457.

"The Sherman Act is not involved here except in so far as it shows a declaration of public policy to be considered in determining what are unfair methods of competition, which the Federal Trade Commission is empowered to condemn and suppress. * *." *F. T. C.* v. *Beech-Nut Co.*, 257 U. S. 441.

"*The members of the associations dominate the paper trade in question.* They are organized to further common purposes * *. Suggested prices for Idaho and Montana were sent out with the Spokane lists. There was an understanding that such prices would be followed. * *

"The fact that there is no established rule that the lists shall be followed in taking orders for interstate shipments or that the quoting of lower prices is an infraction for which complaint may be made is not controlling in favor of respondents. *An understanding, express or tacit, that the agreed prices will be followed is enough to constitute a transgression of the law. No provision to compel adherence is necessary.* * *

"The use of the association prices by all the salesmen in making sales in interstate territories is not necessarily to be regarded as coincidence. There is ample ground for saying that such use results from the admitted combination. * *

"Its (the Commission's) conclusion that the habitual use of the established list lessens competition and fixes prices in interstate territory cannot be said to be without sufficient support." *Federal Trade Commission* v. *Pacific Paper Assn.*, 273 U. S. 52.

See also: *Millinery Creators' Guild* v. *F. T. C.*, 109 F. 2d 175; *Standard Oil Co.* v. *F. T. C.*, 282 F. 81, 87; *Silver Co.* v. *F. T. C.*, 289 F. 985; *So. Hardware Jobbers Assn.* v. *F. T. C.*, 290 F. 773, 779; *Standard Container Mfg. Assn.* v. *F. T. C.*, 119 F. 2d 262; *Nat. Harness Mfg. Assn.* v. *F. T. C.*, 268 F 705; *Chamber of Commerce* v. *F. T. C.*, 13 F. 2d 673; *Ark. Growers Assn.* v. *F. T. C.*, 18 F. 2d 866; *Armand Co.* v. *F. T. C.*, 78 F. 2d 707.

to which all in the industry have subscribed. In other words, if this contention were accepted, it would only be when one or more competitors are left out or refuse to subscribe to the price-fixing agreement that the Federal Trade Commission could intervene. This would defeat the purpose of the Act. Price fixing usually results in price raising. That, and the elimination of price cutting, are the objects of such agreements. It is not often that any competitor in the industry is hurt by an agreement which raises the prices or an agreement which prevented the cutting of prices. The ordinary and necessary result would be financial advantage, at least temporary advantage to all in the industry. But it would not be to the advantage of the public or to the users of the commodities whose prices are fixed.

"Unfair methods of competition" are not determined by so narrow or one-sided a test. It is the harm, which results from destroying the *"fair opportunity"* for competition among competitors which results from a price fixing agreement, created and established by such combination, that makes the action unfair as that term is used in the Act. It is the restriction on the play of competition under normal conditions that presents a case of "unfair method of competition." (*F. T. C.* v. *Pacific Paper Assn.*, 273 U. S. 52; *Cal. Rice Industry* v. *F. T. C.*, 102 F. 2d 716, 722.)

Sufficiency of the Evidence to Support the Commission's Findings. The evidence not only supports the fact findings of the Commission as to the suppression of competition agreements, but it made any other finding impossible. No rational or satisfactory explanation is made of the testimony which showed that petitioners repeatedly made identical bids ranging from $3,441.20 to $34,095.50. To illustrate the similarity of such bids it may be said that on one occasion twelve bids of $23,211.76 were submitted on one lot, at another time, $23,488.11 was the bid submitted by each of thirteen bidders; at another, ten competitors each bid $5,767.74, while at still another time, thirteen bids, each for $3,441.20 were made; and on two other occasions twelve separate bids were, one for $6,692.75, and the other, for $6,112.44. These were but a few of the instances appearing in the record.

Equally conclusive was the record which showed the language of the rules of fair competition. The following is illustrative of practices condemned:

> "Sell, or offer to sell, products on which price information has been filed and published at less than the lowest net price filed and published by any member on such product or products; nor sell, or offer to sell, special products which are not covered by his filed and published price list, at net prices more favorable to the purchaser than the lowest filed and published net price of a similar item of comparable grade."

Addressing a section of the S. A. M. A. the Chairman of the Executive Committee, Mr. Keller said:

> "Another benefit which our Section enjoyed under the N. R. A. is the Open Sales Price Policy. According to legal advice obtained by the Code Authority there is a way to maintain this system.
>
> "Gentlemen, if you judge the future by your past experiences, I believe there is only one conclusion you can reach full-heartedly and that is to keep up our trade organization. There is only one way to do it, and I believe you will agree with me: We can work together only by living up to our present trade provisions as we have done in the past. In fact, every one of us will have to go a step further and take special precautions that no errors or mistakes slip through his organization. * * If you want to continue our trade cooperation, you must take the necessary precaution to avoid all and any mistakes. Either we live up to our present Code—if I may still use this word—100% voluntarily—or we shall slide back to the old destructive competition. There is no half way.
>
> "My final plea to you is: Let us voluntarily uphold our Code provisions 100%, and continue to compete on a friendly and fair basis. There is no agreement to this effect between us, either openly or implied, but under present conditions strong trade cooperation is essential to the intereset of each and every member."

Another interesting and pertinent piece of evidence is a letter dated February 24, 1936, from Mr. Keller to the

manager of S. A. M. A. concerning a member of the Association. This letter read:

> "Information has reached us that the B. K. Elliott Co. of Pittsburgh are furnishing a 35% rag blueprint paper in 25 lb. weight. The tests we have made on their paper confirm that information.
>
> "According to our trade Code and blueprint standards, such paper should not be sold as our trade standardized on a 24 lb. paper, either 25% rag or 50% rag.
>
> "Furthermore, the B. K. Elliott Co. is selling the 35% rag paper at their standard price for a 25% rag paper.
>
> "Please write to them, giving them the above information and ask them for an explanation."

Also supporting this conclusion is an occurrence quite unusual in proceedings of this nature.

When the time came to answer the complaint, S. A. M. A. and several individual respondents employed a Mr. Fisher, of Chicago, who filed answers for them wherein it was admitted that the allegations of the complaint filed by the F. T. C. were true. Mr. Fisher's statement is on file and in that statement he states he consulted with each respondent before he filed "confessing" answers and that said answers were all filed with the full and adequate authorization and consent of the said respondents. These answers were, however, later all withdrawn and "denial" answers substituted.

For the purpose of this review we ignore these admissions thus made, but observe that it is contrary to our experience to find counsel admitting charges of the kind here set forth in the complaint for divers defendants when such admissions are contrary to the facts or clients' instruction.

Carrying Out the N. R. A. Code. It is also argued with some emotion that petitioners were endeavoring to carry out the President's wishes and maintain prices and avoid competition of the cut-throat variety, so rampant in 1932 and 1933. This was the object of the N. R. A. and although the vital parts of the N. R. A. were stricken down* by the

* By presidential order promulgated December 31, 1935, and effective January 1, 1936, the National Recovery Administration and the office of the Administrator were terminated. All activities relating to the National Recovery Administration were to terminate not later than April 1, 1936.

decision in *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, it was still a patriotic duty of all the competitors in this industry, so petitioners say, to do voluntarily what they could not be compelled to do legally.

There are at least three reasons why this argument must be rejected. First, and foremost, are the Sherman Anti-Trust Act and the Federal Trade Commission Act. The teeth of the Sherman Act were drawn by the operation of the N. R. A. What was before illegal and criminal misconduct was not so under the N. R. A. The prohibitions against combinations in restraint of trade were lifted. When the N. R. A. was invalidated by judicial pronouncement of the Supreme Court, the Sherman Act and the F. T. C. Act again became unrestrainedly operative and their restrictions against combinations again governed industries engaged in interstate commerce.**

What was won by killing the N. R. A. was a reawakened or reborn Sherman Act and the F. T. C. Act. The Sherman anti-trust and the F. T. C. Act arose from the same grave in which the N. R. A. was buried.

Second, the N. R. A. permitted price fixing. In fact, it decreed price fixing. It is true, it was allegedly enacted to meet a temporary condition, an emergency, but even so, price stabilization was its objective and its result.

There was, however, one feature of the Act which must not be overlooked,—the public was represented in price fixing. By successfully assailing the N. R. A. the *government supervision* of the price fixing was eliminated. This result followed when the Act was stricken down. Then competitors proclaimed their willingness to abide by price fixing agreements, with public participation in the price fixing eliminated. Such a practice made the competitors the uncontrolled arbiters of their own prices. It was not

** It may be argued that the N. R. A., being unconstitutional, never lifted the restrictions found in either anti-monopoly act. In other words the N. R. A. was ineffective for all purposes. We are convinced that notwithstanding this fact, the Government was estopped to prosecute citizens who complied with N. R. A. codes, for violations of either the Sherman Antitrust or the F. T. C. Acts, because the N. R. A. was presumably valid until by judicial pronouncement it was declared to be invalid, and in this case invalidity was not determined until its unconstitutionality was decreed by the Supreme Court.

a carrying out of the N. R. A. practice for an important part of the practice was eliminated.

Third. The defense must fail for the added reason that no official, whether he be the President or any other official, could lift the bar of either the Sherman Act or the F. T. C. Act. If the President made the request to maintain prices, they were wasted words, idle and impotent.*

The Sherman Act and the Federal Trade Act were the law of the land and governed petitioners and all others like them. No government official could suspend them. Only through legislative enactment such as the N. R. A. could they be superseded. In short, petitioners cannot avoid liability for their actions because requested by some public official so to do. If such request could be shown it would have been of no more force than if spoken by a private citizen. Only Congress can lift the restrictions which find expression in the Sherman Act. (*U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 227, 228.)

Breadth of the Order. Complaint is made that the *evidence* chiefly concerned itself with blue print paper and other reproduction papers and cloths, whereas the *order* covers a multitude of items† as to some of which there was little or no evidence. These items were all those enumerated in the complaint, except for two differences probably due to printing errors.

The Commission points out that the long list of products was incorporated in the Code approved under the N. R. A., and it is stipulated that the members of the Section distribute those products. The Commission also points

* The fact that the President terminated the functions of all N. R. A. officials and Codes, negatives the idea that the Act was extended by executive order.

† "* * prepared tracing papers, tracing cloths, blueprint papers and cloths, other reproduction papers and cloths, profile and cross-section papers and cloths in sheets and rolls, coordinate papers—graph sheets (except ruled sheets) for engineering and drafting purposes, field books for engineers, drawing instruments, drawing tools (scales, triangles, T-squares, curves), draft machines, blueprinting machines and equipment, drawing boards and tables, filing cabinets for drawings and blueprints, lettering devices and lettering pens for the drafting profession, slide rules, planimeters and integrators, surveying instruments, surveying barometers, forestry instruments such as tree calipers, hypsometers, increment borers, current meters and water-stage registers, rods and poles for surveyors' use, tapes, chains and plumb bobs."

out that "It is stipulated that the manager of the SDC Section determined, pursuant to the provisions of the Code, that it was the general practice of the members of the Section to sell their products on the basis of a published net price list or price list with discount sheets. This determination was not restricted to reproduction papers and cloths, but was in terms applicable to all Section products." These products were all listed in the Rules of Fair Competition adopted by the Section, in 1936, and the Rules (3.1) provided that it shall be an unfair practice to "sell, or offer to sell, directly or indirectly, *any product of the Section* on which price information has been published, at less than the lowest net price published by any member on such product or products."

The resolution adopted at the June, 1936, meeting provided for the filing of price terms of the products each member manufactured. It was not necessary to prove that the members followed the practice as to each product sold, when the general scheme is shown, and as here proof was presented as to some of the items. We can well assume, as the Commission did, that the scheme was meant to encompass all the products of this nature manufactured by the members of the section, without detailed proof as to each item affected.**

Moreover, in view of the showing of general policy, of unwillingness of petitioners here, to correct their practices, save under compulsion of an effective order, it was appropriate if not compulsory for petitioners to propose to the F. T. C. that they would not fix prices in respect to other articles which they sell.

It is never proper or appropriate for the Commission to enjoin acts which were never committed nor threatened by the industry involved. Where, however, as here, the parties assume a role which leads to the conviction that they will continue to violate the provisions of the Federal Trade Commission Act and the Sherman Act and are doing so, the order to cease and desist should be broad and inclusive enough to *stop* the practices once and for all time.

****** *U. S. v. Trenton Potteries*, 273 U. S. 392; *U. S. v. Socony-Vacuum Co., Supra; N. L. R. B. v. Express Co.*, 312 U. S. 426; *Fashion Guild v. F. T. C., supra.*

Effect of Cessation of Practice Condemned by Order, Before Entry of Order. Dietzgen Co. contends, separately and especially, that the order should not have been entered as to it because it resigned from SAMA on March 4, 1938.

A petitioner's discontinuance of acts which are subsequently found to be illegal, has been held not to bar the issuance of a cease and desist order.* It has also been so held in the analogous field of the National Labor Relations Act.**

The propriety of the order to cease and desist, and the inclusion of a respondent therein, must depend on all the facts which include the attitude of respondent towards the proceedings, the sincerity of its practices and professions of desire to respect the law in the future and all other facts. Ordinarily the Commission should enter no order where none is necessary. This practice should include cases where the unfair practice has been discontinued.

On the other hand, parties who refused to discontinue the practice until proceedings are begun against them and proof of their wrongdoing obtained, occupy no position where they can demand a dismissal. The order to desist deals with the future, and we think it is somewhat a matter of sound discretion to be exercised wisely by the Commission—when it comes to entering its order.

The object of the proceeding is to *stop* the unfair prac-

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* "But mere discontinuance of unfair competitive methods, however, is no defense. *Fed. Trade Comm.* v. *Wallace*, 75 F. 2d. 733, 738; *Butterick Co.* v. *Fed. Trade Comm.*, 4 F. 2d. 910; *Fox Film Corp.* v. *Fed. Trade Comm.*, 296 F. 353; *Guarantee Veterinary Co.* v. *Fed. Trade Comm.*, 286 F. 853." *Armand Co.* v. *F. T. C.*, 78 F. 2d. 707 (CCA 2).

"The discontinuance of the practice claimed by the Commission to be illegal, even though it is not a bar to a Commission proceeding, might well be and has on some occasions been, considered by the Commission as sufficient reason to dismiss a complaint especially where there is no reason to believe the practice will be resumed." Federal Trade Law and Practice, Beer, page 198.

See also *Bunte Bros.* v. *F. T. C.*, 104 F. 2d. 996; *F. T. C.* v. *McLean & Son*, 84 F. 2d. 910; *Holloway Co.* v. *F. T. C.*, 299 U. S. 590; *Fairyfoot Products Co.* v. *F. T. C.*, 80 F. 2d. 684; *Ark. Grocers Assn.* v. *F. T. C.*, 18 F. 2d. 866; *Chamber of Commerce* v. *F. T. C.*, 13 F. 2d. 673; *Fox Film Corp.* v. *F. T. C.*, 296 F. 353; *Sears, Roebuck Co.* v. *F. T. C.*, 358 F. 307; *Hershey Corp.* v. *F. T. C.*, 121 F. 2d. 968; *Perma-Maid Co.* v. *F. T. C.*, 121 F. 2d. 282; *Nat. Silver Co.* v. *F. T. C.*, 88 F. 2d. 425.

** *Pueblo Co.* v. *N. L. R. B.*, 118 F. 2d. 304; *N. L. R. B.* v. *Gerling Co.* 103 F. 2d. 663; *N. L. R. B.* v. *Burke Mach Tool Co.*, 133 F. 2d. 618.

tice. If the practice has been surely stopped and by the act of the party offending, the object of the proceedings having been attained, no order is necessary, nor should one be entered. If, however, the action of the wrongdoer does not insure a cessation of the practice in the future, the order to desist is appropriate. We are not satisfied that the Commission abused that discretion in the instant case.

In Re Motion for Leave to Adduce Additional Evidence Before Commission. There was filed by petitioner Bruning, a motion for leave to adduce additional evidence before the Commission, which motion was denied without prejudice to renew the same. The motion was renewed at the time of the oral argument. In brief, the motion states that petitioner, if the cease and desist order be approved by us, will be placed in the dilemma of violating the Emergency Price Control Act of 1942 (50 U. S. C. A. App. Sec. 925, *et seq.*)

The Commission argues that this court takes judicial notice that the Emergency Price Control Act was enacted after the Commission's order was entered and therefore can have no effect upon its finding of the existence of a conspiracy.

The Commission goes further, and in a commendable effort to iron out this superficial conflict of jurisdiction, wrote to the General Counsel of the Office of Price Administration and specifically presented all the facts to him, and received a definite and specific reply that there was no conflict between the two Acts, or the administrative practice thereunder. In other words, under the Price Control Act, a maximum is set for each seller and not for the industry at large, and that it was the purpose of the latter Act to foster competition in the hope that inflation would be avoided or deterred.

Petitioners may not be successfully prosecuted for a violation of the F. T. C.'s cease and desist order, where the Commission's order is subject to any valid order or action under the Emergency Price Control Act.

The motion for leave to adduce additional evidence is denied.

Other questions raised by petitioners we have considered but do not deem them of such importance as to require special consideration.

The order of the Commission is approved. Counsel for respondent will draw a proposed order and submit it to petitioners, pursuant to the rule of this court respecting the drafting of orders in cases where appeal is taken from a ruling of an Administrative Board. In such order, respondent is directed to modify its order and make it clear that the cease and desist order enjoins petitioners from doing any of the acts or things condemned *pursuant* to any agreement, combination or conspiracy here found to exist.

APPENDIX.

OPINION OF THE CIRCUIT COURT OF APPEALS.

Nos. 7791, 7820, 7821, 7828.

October Term, 1943, April Session, 1944.

May 3, 1944.

Before Evans and Major, *Circuit Judges*, and Lindley, *District Judge*.

Evans, *Circuit Judge*. The petitions for rehearing which have been filed in this case justify our writing this additional statement.

Upon due consideration of them,

It Is Ordered that the word "four," the first word in the opinion, be stricken therefrom.

It Is Further Ordered that the words "four in number" be stricken from the paragraph of one sentence, which paragraph immediately precedes the paragraph beginning with the words, "Jurisdiction of the F. T. C. to issue cease and desist Order."

It Is Further Ordered that the first sentence of the opinion, under the heading, "Jurisdiction of the F. T. C. to Issue Cease and Desist Order against Activity within Purview of Sherman Act," be modified by inserting after the words, "most seriously pressed by" and before the words "petitioners," the following words, "some, though not all."

It Is Further Ordered that there be inserted as a paragraph immediately preceding the last paragraph of the opinion, the following:

Petitioners, Keuffel & Esser Company and Karl Keller,

insist that their position differs from that of the other petitioners and we have not given it proper consideration. They say they did not take the legal positions which the other petitioners took and they assert that the evidence, as against them, fails to show any guilty participation in unfair trade practices such as are charged by the Federal Trade Commission.

We agree that their position differs from that taken by the others, both as to facts and as to the legal questions they raise. We have given their argument further consideration but are unable to change our conclusions.

The fact that these petitioners did not join the combination to restrain trade and fix prices and eliminate competition, when the others first acted, does not relieve them of liability, if in fact they subsequently joined with the others and helped effectuate the unfair trade practices by eliminating competition. *Allen* v. *United States,* 4 F. 2d 688.

The evidence justifies the finding that these petitioners participated in the illegal practices by adhering to the prices which their competitors fixed and agreed upon. One may be liable regardless of when he joins the unlawful trade practices.

Where numerous competitors fixed the prices which they agree to maintain, and another competitor, not a party to the agreement originally, adopts the schedule and makes his prices agree, to the last penny, as the petitioners did, with the prices which the competitors fixed and charged, he can not avoid responsibility for his action even though he be less active in the first instance, or because his subsequent action was without affirmative, express agreement on his part to maintain the prices fixed by the others.

We must look to the substance and not to the form of the conspirators' conduct. We do not think that affirmative, positive, express agreement to maintain prices is essential to establish unfair trade practices. If the parties clearly and intentionally maintain the prices, even though without express agreement, they are liable. In such a situation their action may fall within the prohibition of the Federal Trade Commission Act. An artificial price level not related

to the supply and demand in a given commodity, may evidence concerted action of sellers operating to restrain commerce. That is what the evidence here shows.

The rule stated in *Interstate Circuit* v. *United States,* 306 U. S. 227, and *U. S.* v. *Masonite,* 316 U. S. 265, applies here. "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish unlawful conspiracy under the Sherman Act." It is also sufficient to establish unfair methods of competition under the F. T. C. act.

Except as to the foregoing modifications the petitions for rehearing are all denied.

Section 4(a) of the National Industrial Recovery Act.

Section 4(a) of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. Ch. 90, 195) was as follows:

> SEC. 4. (a) The President is authorized to enter into agreements with, and to approve voluntary agreements between and among, persons engaged in a trade or industry, labor organizations, and trade or industrial organizations, associations, or groups, relating to any trade or industry, if in his judgment such agreements will aid in effectuating the policy of this title with respect to transactions in or affecting interstate or foreign commerce, and will be consistent with the requirements of clause (2) of subsection (a) of section 3 for a code of fair competition.

(2)

IN THE

Supreme Court of the United States

October Term, 1944.

No. 304

EUGENE DIETZGEN CO.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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SUBJECT MATTER INDEX.

Alphabetical Table of Cases Cited.

IN THE

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Opinions of the Circuit Court of Appeals.

The original opinion of the Circuit Court of Appeals was rendered on February 29, 1944 and is reported in 142 F. (2d) 321 (Appendix 1, R. 991, 1006). A petition for rehearing was filed on March 14, 1944 (R. 1006).

The Circuit Court, on May 3, 1944, rendered a supplemental opinion (not yet reported) (Appendix 17; R. 1012, 1014) and denied the petition for rehearing (R. 1014).

Jurisdiction.

The grounds for the jurisdiction of this Court are set forth in the petition (p. 2).

The decree of the Circuit Court sought to be reviewed was entered May 22, 1944 (R. 1016).

Summary of the Matters Involved.

A summary of the matters involved appears under the above heading, beginning on page 3 of the petition, which deals with the nature of and the material allegations of the complaint instituted by the Commission and subsequent proceedings under the following sub-heads: Separate Answer of Eugene Dietzgen Co. to the Complaint; Certain Facts Stipulated; Petitioner Resigned from SAMA and the SDC Section March 4, 1938; McDonald Testimony; Certain Charges in Complaint Not Sustained by Commission.

Specification of Errors to Be Urged.

If the writ is granted, petitioner will urge that the Circuit Court erred in the following respects:

(1) In holding that the Federal Trade Commission had jurisdiction and power

(a) To file a complaint alleging completed and continuing violations of the Sherman Act as constituting unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

(b) Under said complaint to hold hearings thereon and to determine the existence of the violations of the civil and criminal provisions of the Sherman Act alleged in the complaint, which would require the exercise of full and complete judicial power although it is only an administrative body.

(c) To declare by its fiat that such violations of the Sherman Act constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

(d) To enter a cease and desist order in complete injunctive form, restraining petitioner and others from carrying out the agreements, understandings, combinations and conspiracies in violation of the Sherman Act found by it to exist.

(e) To administer the Sherman Act, and restrain violations thereof, although said Act vests exclusive jurisdiction in the District Courts to enforce said Act, and to enjoin violations thereof.

(2) In holding that it was unnecessary to prove the existence of competitors of petitioner, either actual or potential, or to prove that any of such competitors or their businesses were in any manner injured or their business injuriously affected by any act or acts of the petitioner.

(3) In holding that subsequent to the decision of this Court in *Shechter Poultry Corporation* v. *United States*, 295 U. S. 495, the petitioner's action in compliance with the President's request for voluntary code observance, in continuing to adhere to its prices and discounts, filed as required by the Code and the National Industrial Recovery Act, constituted a violation of the Sherman Anti-Trust Act notwithstanding the provisions of Section 4(a) of the National Industrial Recovery Act.

(4) In holding that Section 3.1 of Article II of the "Rules of Fair Competition" of the SDC Section (Exhibit 11-a) constitutes a violation of the Sherman Act and a violation of Section 5 of the Federal Trade Commission Act.

(5) In sanctioning the action of the Federal Trade Commission, in receiving in evidence over the objections of the petitioner, certain correspondence and documents obtained by it in the course of its investigation of the matters involved in the complaint, from the files of other respondents, and then upon the demand of the petitioner refusing to produce such other correspondence and documents obtained by it at the same time from the files of such other respondents, relating to the same matters and in the same investigation, and then in its possession, which other correspondence and documents were not available from any

other source, and which refusal deprived petitioner of a fair hearing, as required by Section 5(c) of the Federal Trade Commission Act, and constituted a denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(6) In holding that the cease and desist order entered by the Commission was supported by lawful evidence, and that it was not contrary to the undisputed evidence of record before the Commission.

Questions Presented by the Petition Are Within the Scope of Paragraph 5 (b) of Rule 38 of the Rules of This Court.

On Pages 18 to 20 of the petition for the writ, petitioner sets forth ten questions presented to this Court. All of these questions were presented to the Federal Trade Commission and to the Circuit Court of Appeals, and all of them were decided adversely to the contentions of the petitioner both by the Commission and by the Circuit Court.

Erroneous Statements of Fact in Opinion of the Circuit Court.

In its first opinion of February 29, 1944, the Circuit Court has made certain erroneous statements of fact which were not corrected in its opinion of May 3, 1944. We deem it important to call the attention of this Court to some of these erroneous statements.

1. In its opinion (Appendix, p. 2), the Circuit Court said:

> "Some of the competitors engaged in this business, first associated together in a trade organization in April, 1919. This same organization incorporated in January, 1936, and was known as the Scientific Apparatus Makers of America, hereinafter referred to as 'SAMA.' "

In Paragraph 2 of the Stipulation of Facts (R. 134) it is stated, in substance, that SAMA first organized in April, 1919, limited its members to those engaged in the production of strictly scientific instruments and did not remove such limitation until some time after June 16, 1933 (subsequent to enactment of N. I. R. A.). Petitioner and other respondents, in the proceeding before the Commission, did not become members of SAMA until approximately August 1, 1933, when they did so at the request of SAMA and for the purpose of joining said Association in applying for a code of fair competition, as provided in the National Industrial Recovery Act (Stip., Par. 5, R. 134, 135).

2. In its opinion, the Circuit Court states (Appendix, pp. 4, 5):

> "The F. T. C. reached the conclusion that a conspiracy was formulated (and later carried out) at the four meetings of the S. D. C. Section and SAMA held first in June, 1932, at Detroit, * * *."

This is a complete misapprehension of the facts, as shown by the stipulated facts above referred to. The petitioner and other respondents were not members of SAMA in 1932, and there was no S. D. C. Section in existence at that time (Stip., Par. 2, 5; R. 134, 135).

ARGUMENT.

I.

First Reason Relied Upon for the Allowance of the Writ.

The question, broadly stated, is whether the Federal Trade Commission has the jurisdiction and power, under the Federal Trade Commission Act, to administer the Sherman Act by hearing and determining violations of both the civil and criminal provisions thereof and then restrain the carrying out of the same through a cease and desist order completely injunctive in form, and thus usurp the jurisdiction and powers vested by the Sherman Act in the District Courts of the United States to enforce said Act.

The question set forth in detail in said petition has been subdivided into paragraphs (a), (b), (c), (d) and (e) (Petition, pp. 21, 22). These subparagraphs show the various steps taken by the Commission, the nature thereof, the determinations reached, the various types of powers exercised in entering the order complained of, each of which must be considered in determining the jurisdiction and powers of the Federal Trade Commission under the Federal Trade Commission Act.

The Circuit Court decided that the Federal Trade Commission has the jurisdiction and power to perform the acts set forth in the question and its various subparagraphs (Appendix, pp. 6, 7).

The petitioner earnestly contends after most diligent search, that this vitally important question, which goes to the very foundation of the jurisdiction and power of the Federal Trade Commission in a case of this character, has never been presented to or decided by this Court in any prior case.

The Circuit Court in its opinion (Appendix, p. 6) states that the question raised is not new and that this Court has decided the question in accordance with the conclusion of the Circuit Court shown in its opinion (Appendix, p. 7).

In support of this conclusion the Circuit Court cites three cases decided by this Court:

Fashion Originators Guild v. *Federal Trade Commission*, 312 U. S. 457; 61 Sup. Ct. Rep. 703.

Federal Trade Commission v. *Beechnut Packing Co.*, 257 U. S. 441.

Federal Trade Commission v. *Pacific States Paper Trade Assn., et al.*, 273 U. S. 52, 47 S. Ct. Rep. 255.

Petitioner believes an analysis of each of these cases will clearly establish that the question now presented was not presented to or decided by this Court in said cases.

Analysis of Fashion Guild Case.

The complaint instituted by the Commission in that case charged that the acts and things set forth therein constituted unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. On page 463 of the opinion this Court, speaking through Mr. Justice Black, said:

> 'If the purpose and practice of the combination of garment manufacturers and their affiliates *runs counter to the public policy declared in the Sherman and Clayton Acts*, the Federal Trade Commission has the power to suppress it as an unfair method of competition.'' (Italics supplied.)

This statement is similar to one in the Beechnut case shown later and must be construed in connection with the statements of this Court in the Raladam and other cases hereinafter cited, to mean that the Commission was to

stop in their incipiency practices which, if permitted to continue, might ripen into violations of the Sherman Act.

It was evidently not intended to mean that the Commission could hear and determine that parties had in fact violated the provisions of the civil and particularly the criminal sections of the Sherman Act, as the Circuit Court in the instant case held, and then issue an order in injunctive form as the District Courts are empowered to do by the provisions of that act. Such a construction of the statement in the opinion of this Court would in effect give the Commission concurrent jurisdiction with the District Courts to enforce the provisions of the Sherman Act.

This Court on page 464 of its opinion commented on the Commission's findings of fact as to the existence of understandings, agreements, combinations and conspiracies entered into jointly and severally by the petitioners.

It further noted on said page that the Commission found that the agreements, etc., mentioned had prevented sales in interstate commerce, and had "substantially lessened, hindered and suppressed" competition, and had "tended to create in themselves a monopoly."

After observing the foregoing matters this Court, on the same page of the opinion, then quoted the material portions of Section 3 of the Clayton Act (38 Stat. 731; 15 U. S. C. A., Sec. 14).

In substance, said Section 3 declares that it shall be unlawful for any person engaged in commerce to lease or make a sale or contract for a sale of goods or machinery, patented or unpatented, for use or resale, or fix the price to be charged therefor or the discount therefrom, on the condition, agreement or understanding that the purchaser or lessee thereof shall not use or deal in the goods or ma-

chinery of a competitor or competitors of the seller or lessor

> "where the effect of such sale or contract may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

With reference to the Clayton Act, the Commission is expressly authorized by Section 11 to institute a complaint based upon alleged violations of said Section 3.

This Court in its opinion clearly indicates that the acts found by the Commission in that case constituted a violation of Section 3 of the Clayton Act, as shown by the following statement in the opinion of this Court (p. 464):

> "The relevance of this section of the Clayton Act to petitioners' scheme is shown by the fact that the scheme is bottomed upon a system of sale under which (1) textiles shall be sold to garment manufacturers only upon the condition and understanding that the buyers will not use or deal in textiles which are copied from the designs of Textile Manufacturing Guild members; (2) garment manufacturers shall sell to retailers only upon the condition and understanding that the retailer shall not use or deal in such copied designs."

This Court further stated, on said page:

> "*And the Federal Trade Commission concluded in the language of the Clayton Act* that this understanding substantially lessened competition and tended to create a monopoly." (Italics supplied.)

It thus appears that this Court considered that the acts found by the Commission constituted a clear violation of Section 3 of the Clayton Act which the Commission is empowered to enforce. The Commission did not proceed as it might have done under the provisions of Section 11 of the Clayton Act to restrain or prevent violations of Section 3 of said Act.

This Court then declared, on the same page:

> "We hold that the Commission, upon adequate and unchallenged findings correctly concluded that this practice constituted an unfair method of competition."

It does not appear that any contention was made that the Commission had no jurisdiction because the complaint was not filed under Section 11, but under Section 5.

The Clayton Act (38 Stat. 730; 15 U. S. C. A., Sec. 12, *et seq.*) was approved October 15, 1914, only nineteen days after the approval of the Federal Trade Commission Act (38 Stat. 718).

If the Federal Trade Commission already possessed the power to enforce the Clayton Act upon a complaint filed under Section 5 of the Federal Trade Commission Act, then the action of Congress in enacting Section 11 of the Clayton Act giving the Commission special jurisdiction to enforce Sections 2, 3, and 7 was a vain and useless act.

It must be conclusively presumed that Congress believed that in enacting Section 11 of the Clayton Act it was giving the Federal Trade Commission a new power not already possessed by it at the time that Act was adopted.

This presumption is further fortified by the action of Congress in the adoption of the Robinson-Patman Act (49 Stat. 1526, 15 U. S. C. A., Sec. 13) approved June 19, 1936, which amended Section 2 of the Clayton Act. Section 2 of the Robinson-Patman Act provides, in substance, that if the Commission proceeds to enforce Section 2 of the Clayton Act, as amended, it must do so by a complaint under Section 11 of said Act.

This Court did not, however, hold that the acts in that case constituted violations of the Sherman Act.

In the instant case, the complaint charges acts which, if true, clearly amounted to complete violations of the civil and criminal provisions of the Sherman Act.

A careful reading of the opinion of this Court shows that the jurisdiction and power of the Federal Trade Commission to enforce provisions of the Sherman Act

upon a complaint based upon the provisions of Section 5 of the Federal Trade Commission Act was not presented to or decided by this Court in said case.

Analysis of Beechnut Packing Company Case.

Federal Trade Commission v. *Beechnut Packing Co.*, 257 U. S. 441, 452, 453, 455, 456.

The Federal Trade Commission instituted a complaint under the provisions of Section 5 of the Federal Trade Commission Act against the Beechnut Packing Company, charging that said Company's complicated system of making sales, which demanded that its customers exact the retail prices imposed upon them by the stringent provisions of the agreement to sell, and permitted the Beechnut Company to examine the books of its customers and send out investigators to ascertain whether they were complying with their agreements, tended to create a monopoly, and it therefore made a finding that the acts complained of constituted unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

It appears from this Court's opinion (pp. 454, 455) that the chief purpose of the Beechnut system of selling was to require the observance of resale prices of its goods. This also is a case which shows a clear violation of Section 3 of the Clayton Act, although in the majority opinion written by Mr. Justice Day there is no mention of that Act.

The Sherman Act is referred to in the majority opinion (p. 453) but is qualified by the statement that:

> "The Sherman Act is not involved here except in so far as it shows a declaration of public policy to be considered *in determining what are unfair methods of competition, which the Federal Trade Commission is empowered to condemn and suppress.*" (Italics supplied.)

This language in the majority opinion of Mr. Justice Day has been construed to mean that the Federal Trade Commission Act is aimed at the elimination of methods of competition "which, if left untouched, would probably create the evils prohibited by the Sherman Anti-Trust Act." *Butterick Publishing Co.* v. *Federal Trade Commission*, 85 Fed. (2d) 522, 526."

In the Beechnut case there were four dissents. A dissenting opinion was written by Mr. Justice Holmes, in which Justices McKenna and Brandeis concurred, and a separate dissenting opinion was written by Mr. Justice McReynolds.

The majority opinion of this Court held that the order of the Commission was too broad, and modified it (p. 456). An analysis of this modification imposed by this Court shows that this Court did not consider that the Sherman Act was involved or that any violation of that Act was shown.

In the present case against this petitioner, the Commission completely abandoned its charge that the petitioner and others had fixed resale prices for their products at which dealers were required to sell the same.

The question raised by the petitioner herein as to the jurisdiction and power of the Commission to restrain complete violations of the Sherman Act was not presented to or decided by this Court in the Beechnut case.

Analysis of Pacific States Paper Case.

(*Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52.)

In the above case the Federal Trade Commission made an order requiring the respondents to cease and desist from certain methods of competition in interstate commerce

found by it to be in violation of Section 5 of the Federal Trade Commission Act of September 26, 1914 (38 Stat. 717).

From a stipulation of facts the following appeared: Dealers in paper in each of the five principal jobbing centers on the Pacific Coast, covering Seattle, Tacoma, Spokane, Portland, San Francisco and Los Angeles had a local association. The Pacific States Paper Trade Association is a general one, whose members are the paper dealers in the jobbing centers above mentioned, including most but not all of the members of the local associations and some who do not belong to such associations.

This Court, at page 60 of its opinion, stated in substance that the Commission's findings of fact substantially follow the stipulation of facts from which it drew inferences or conclusions that the habitual carrying and use of such association price lists by member jobbers in quoting prices and making sales outside the state had a natural tendency to and did limit and lessen competition therein, and that the result of such practice was fixed and uniform prices for such products within such territories.

In the entire opinion in this case there is no mention of the Sherman Act or of the Clayton Act. The limitation of the powers of the Commission to its purely administrative functions, its lack of judicial power, or that the complaint may have charged complete violations of the Sherman law, and if so, that the Commission, in entertaining the complaint and in making its order, usurped the exclusive powers of the District Court to enforce the provisions of the Sherman Act vested in said courts by said Act, were questions not raised by the respondents in said case.

Commission's Power Under Section 5 of the Federal Trade Commission Act Is Limited to the Administration of Said Act.

In its brief in the Circuit Court the Commission did not contend that it has power to administer or enforce the provisions of the Sherman Act, but it seems clear that the Commission cannot do by indirection what it could not do directly.

The Commission in its brief in the Circuit Court contended that "A combination or conspiracy in restraint of competition, if unlawful under the Sherman Act, is an unfair method of competition within the meaning of the Federal Trade Commission Act." (Br. p. 17.) This is a broad claim which would necessitate a hearing and determination by the Commission that a combination or conspiracy in restraint of competition constituted a violation of the Sherman Act.

The complaint charged full and complete violation of the Sherman Act, including the civil as well as the criminal provisions of said Act. It found as a fact that the acts charged had been done and performed, and that competition had been eliminated, and such finding, if within the Commission's power, was one that would constitute a violation of both the civil and criminal provisions of the Sherman Act.

The conclusion of the Circuit Court, appearing in its opinion (Appendix, p. 7) clearly states that the fact that the acts complained of violate the criminal section of the Sherman Anti-Trust Act, afforded a legitimate basis for the Commission to exercise jurisdiction.

The conclusion of the Court above referred to in effect authorizes the Federal Trade Commission to determine whether or not the criminal section as well as the civil pro-

visions of the Sherman Act had been violated. Such determination requires the exercise of full and complete judicial power which the Commission does not possess. It also requires the Commission to usurp the jurisdiction and powers of the district courts, specifically vested in them by the Sherman Act.

We earnestly contend that said question was not in any manner presented to or passed upon by this Court in the *Fashion Guild* case, the *Beechnut* case, or the *Pacific States Paper Trade Association* case, the only decisions of this Court cited by the Circuit Court to support its decision.

II.

Second Reason Relied on for Allowance of the Writ.

(a) The Circuit Court decided (App. 7) that:

> "Our conclusion is that instead of its being a ground for denying jurisdiction of the F. T. C., the fact that the acts complained of, violate the criminal section of the Sherman Anti-Trust Act, affords a legitimate basis of action by the said Commission."

The foregoing language of the Circuit Court clearly contemplates that the Commission has the authority, under Section 5 of the Federal Trade Commission Act, to institute a complaint charging complete violations of the criminal section of the Sherman Act, hold a hearing thereon, and then determine that the criminal section of the Sherman Anti-Trust Act has been violated.

And further, following such determination, the Commission may then declare that the criminal violation of the Sherman Act so found to exist constitutes unfair methods of competition prohibited by Section 5 of the Federal Trade Commission Act.

Petitioner contends that the language of the court above quoted is tantamount to saying that the Federal Trade Commission may enforce the provisions of the Sherman Act at least by indirect means, by charging that such acts constitute unfair methods of competition contrary to Section 5, if not by a direct proceeding charging a violation of the Sherman Act by name.

This is quite different from an order to "stop in their incipiency those methods of competition which fall within the meaning of the word 'unfair' " or even those "which if left untouched would probably create the evils prohibited by the Sherman Anti-Trust Act."

The decision of the Circuit Court appears to be in conflict with the decisions of this Court in the following cases:

Arrow-Hart & Heggeman Electric Co. v. Federal Trade Commission, 291 U. S. 587, holds that the Federal Trade Commission has no jurisdiction over the administration or enforcement of the Sherman Act. In that case, the Commission by its complaint charged that certain corporations finally merged in the appellant, had performed acts in violation of Section 7 of the Clayton Act (p. 593), which forbids the acquisition of stock by one corporation in other corporations where the effect of such stock acquisition is to substantially lessen competition. Section 11 of the Clayton Act provides the remedy for the enforcement of said Section 7.

This Court held that said Section of the Clayton Act had not been violated and that the Commission's order in respect thereto could not be upheld. Apparently the Commission also sought to justify its order on the ground that the activities of the appellant and other corporations merged therein were in violation of anti-trust laws other

than the Clayton Act. In answering this contention the Court, at page 599 of its opinion, said:

> "If the merger of the two manufacturing corporations and the combination of their assets was in any respect a violation of any anti-trust law, as to which we express no opinion, *it was necessarily a violation of statutory provisions other than those found in the Clayton Act.* And *if any remedy for such violation is afforded a court* and *not the Federal Trade Commission* is the appropriate forum." (Italics supplied.)

Federal Trade Commission v. *Western Meat Company*, 272 U. S. 554, 561, 563.

Thatcher Mfg. Co. v. *Federal Trade Commission*, 272 U. S. 554, 560, 561.

These two cases were disposed of by one opinion. It appeared in the *Western Meat Company* case that the Commission was attempting to invoke the provisions of Section 5 of the Federal Trade Commission Act as well as enforcement of Section 7 of the Clayton Act.

In referring to Section 5 of the Federal Trade Commission Act this Court, on page 557 of its opinion, said:

> "This Section is not presently important. The challenged order sought to enforce obedience to Section 7 of the Clayton Act."

In the *Thatcher Mfg. Co.* case the Commission proceeded under Section 11 of the Clayton Act to enforce the provisions of Section 7 of that Act, and it determined that the acquisition of certain properties of a competitor by the Thatcher Company violated said Section 7. Upon this question this Court, at page 561 of the opinion, said:

> "The act has no application to ownership of a competitor's property and business obtained prior to any action by the Commission, even though this was brought about through stock unlawfully held. * * * If purchase of property has produced an unlawful status, a remedy is provided through the courts. Sher-

man Act, Ch. 647, 26 Stat. 209; Act to Create a Federal Trade Commission, Ch. 311, Sec. 11, 38 Stat. 717, 724; Clayton Act, c. 323, Secs. 4, 15, 16; 38 Stat. 730, 731, 736, 737. *United States* v. *American Tobacco Co.*, 221 U. S. 106."

The reference to the Sherman Act and to the sections of the Clayton Act above cited relate to court remedies under those acts, for the enforcement of the anti-trust laws. Section 11 of the Federal Trade Commission Act cited by this court declares in substance that nothing in said Act shall prevent the enforcement of the anti-trust Acts (38 Stat. 724, 15 U. S. C. A., Sec. 51).

> *Federal Trade Commission* v. *Eastman Kodak Company*, 274 U. S. 619, 623, 624.

The proceeding involved in this case was instituted by the Commission under Section 5 of the Federal Trade Commission Act. In that proceeding the Commission ordered said company to divest itself of certain laboratories acquired by purchase.

This Court, at page 623 of its opinion, in observing that the proceeding was instituted by the Commission under Section 5 of the Federal Trade Commission Act, stated:

> "and its authority did not go beyond the provisions of that section."

This Court further said, on the same page:

> "The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. * * * It has not been delegated the authority of a court of equity, and a Circuit Court of Appeals, on a petition to review its order, is limited to the question whether or not it has properly exercised the administrative authority given it by the Act, and may not sustain or award relief beyond the authority of the Commission."

On page 624 of its opinion this Court referred to page 561 of the opinion in the Thatcher case (hereinbefore cited) on which is found the quotation in said case already set out, and also referred to Section 15 of the Clayton Act and to the Sherman Act for the judicial remedies in the courts in the event the purchase of property produces an unlawful status.

On page 625 of its opinion this Court said:

> "So here the Commission had no authority to require that the Company divest itself of the ownership of the laboratories which it had acquired prior to any action by the Commission. If the ownership or maintenance of these laboratories has produced any unlawful status, the remedy must be administered by the courts in appropriate proceedings therein instituted."

In *Federal Trade Commission* v. *Raladam Company*, 283 U. S. 643, which involved a proceeding under Section 5 of the Federal Trade Commission Act, this Court said, on page 647 of the opinion:

> "The Sherman Act deals with contracts, agreements and combinations which tend to the prejudice of the public by the undue restriction of competition or the undue obstruction of the due course of trade. *United States* v. *American Tobacco Company*, 221 U. S. 106."

On the other hand this Court, on page 650 of its opinion, in discussing the purpose of, and the evils to be remedied by, the Federal Trade Commission Act said:

> "It was urged that the best way to stop monopoly at the threshold was to prevent unfair competition; that the unfair competition sought to be reached was that which must ultimately result in the extinction of rivals and the establishment of monopoly; that by the words 'unfair methods' was meant those resorted to for the purpose of destroying competition or of eliminating a competitor, or of introducing monopoly—such as tend unfairly to destroy or injure the business of a competitor. That the law was necessary to protect small business against giant competitors;" * * *

On page 647 of the opinion this Court said:

> "The object of the Trade Commission Act was to stop in their incipiency those methods of competition which fall within the meaning of the word 'unfair'."

In referring to the powers of the Federal Trade Commission under Section 5 of the Act this Court, on page 649 of its opinion, said:

> "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desired, they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions."

(b) The decision of the Circuit Court quoted above in paragraph (a) imputes to the Commission, a purely administrative agency, the power to determine violations of the Sherman Act. This is a holding that the Commission may determine the existence of violations of a law that it has no power to administer and then order such violations stopped. It would require the Commission to exercise the full and complete judicial power possessed only by a court and which can be conferred only upon a court (Const. Art. III). The decision of the Circuit Court therefore is in conflict with the following decisions of this Court:

> *Federal Trade Commission* v. *Eastman Kodak Company,* 274 U. S. 619, 623, 624.

This case involved the validity of an order of said Commission purporting to have been issued by it under the provisions of Section 5 of the Federal Trade Commission Act, and this Court on page 623 of its opinion made the statement last quoted on page 18 hereof.

Union Bridge Co. v. *United States,* 204 U. S. 364, 386, 387. The bill in this case charged that Section 18 of the Rivers and Harbors Act of March 3, 1899, delegated to the Secretary of War full and complete legislative as well

as judicial powers, and was therefore in conflict with the Constitution of the United States.

The Act complained of authorized the Secretary of War, after hearing, to determine whether or not a given bridge constituted an unreasonable obstruction to navigation. After considering the contentions of the Bridge Company this Court, in construing the statute complained of, said (p. 386):

> "In no substantial, just sense, does it confer upon that officer, as the head of an executive department, powers strictly legislative or judicial in their nature, or which must be exclusively exercised by Congress or by the courts.",

and on page 387 of its opinion in said case this Court further said, concerning the duty imposed upon the Secretary of War by said section of the statute complained of:

> "In performing that duty the Secretary of War will only execute the clearly expressed will of Congress and will not in any true sense exert legislative or judicial power."

Monongahela Bridge Co. v. *United States*, 216 U. S. 177. This case involved the same statute considered by this Court in the *Union Bridge Company* case, *supra*. The Monongahela Bridge Company asked this Court to reconsider its decision in *Union Bridge Co.* v. *United States*, 204 U. S. 364, and to modify the same. In this connection this Court said, on page 192 of its opinion:

> "We perceive no reason for so doing. We adhere to what was said in that case."

(c) The decision of the Circuit Court quoted in paragraph (a) hereof is in conflict with the decisions of this Court hereinafter cited, which hold that an administrative agency, including the Federal Trade Commission, has no power to enforce laws the administration of which is specially confided to another governmental agency, or to determine violations of such other laws.

Federal Trade Commission v. *Raladam Company*, 283 U. S. 643, 649, 654. In this case this Court, in considering the action of the Federal Trade Commission under Section 5 of the Federal Trade Commission Act, said (p. 654):

> "Whether the respondent, in what it was doing, was subjecting itself to administrative or other proceeding under the statute relating to the misbranding of foods and drugs we need not now inquire, for the administration of that statute is not committed to the Federal Trade Commission."

Brougham v. *Blanton Mfg. Co.*, 249 U. S. 495, 499, 500. In this case this Court held that the United States Patent Office, acting through its trademark division, as to a duly registered trademark on meat products, had no power to determine whether said mark was deceptive, because the power to determine that question as to meat products had been specially granted to the Secretary of Agriculture under the meat inspection laws (pp. 499, 500).

Keogh v. *Chicago & Northwestern Railway Co.*, 260 U. S. 156, 162. In this case this Court held that the Interstate Commerce Commission is required, under the Interstate Commerce Act, to determine the legality or illegality of freight rates wholly under the terms of said Act and without regard to the charge that they were the result of an unlawful combination of carriers in violation of the Sherman Act.

(d) The decision of the Circuit Court set forth in paragraph (a) hereof is in conflict with the decisions of this Court in the cases cited below, which hold that the Federal Trade Commission should move before the agreements, understandings, combinations, conspiracies, restraints or monopolies are completed.

Fashion Guild v. *Federal Trade Commission*, 312 U. S. 457, 466. In this case this Court, at page 464 of its opinion, **said:**

> "It was, in fact, one of the hopes of those who sponsored the Federal Trade Commission Act, that its effect might be prophylactic and that through it attempts to bring about complete monopolization of an industry might be stopped in their incipiency" (citing *Federal Trade Commission* v. *Raladam*, 283 U. S. 643, 647, and the report of Senator Cummins, Chairman Committee reporting Federal Trade Commission Act, 51 Congressional Record, 11455).

Federal Trade Commission v. *Raladam*, 283 U. S. 643, 645, 647. In this case this Court, at page 647 of its opinion, stated:

> "The object of the Trade Commission Act was to stop in their incipiency those methods of competition which fall within the meaning of the word 'unfair'."

Federal Trade Commission v. *Raladam*, 316 U. S. 149, 152. In this case this Court, at page 152 of its opinion, stated:

> "One of the objects of the Act creating the Federal Trade Commission was to prevent potential injury by stopping unfair methods of competition in their incipiency. *Fashion Guild* v. *Federal Trade Commission*, 312 U. S. 457, 466."

III.

Third Reason Relied on for Allowance of the Writ.

The Circuit Court in this case has decided a Federal question in a way probably in conflict with applicable decisions of this Court. The Circuit Court decided that:

> "Hardly worthy of serious or extended consideration is petitioners' urge that the order should be set aside because no competitor was hurt by the practices and agreements. To carry this contention to its logical

conclusion would necessitate denial to the Commission of jurisdiction to deal with any price fixing agreement to which all in the industry have subscribed. In other words, if this contention were accepted, it would only be when one or more competitors are left out or refuse to subscribe to the price-fixing agreement that the Federal Trade Commission could intervene. This would defeat the purpose of the Act. Price fixing usually results in price raising. That, and the elimination of price cutting, are the objects of such agreements. It is not often that any competitor in the industry is hurt by an agreement which raises the prices or an agreement which prevented the cutting of prices. The ordinary and necessary result would be financial advantage, at least temporary advantage to all in the industry. But it would not be to the advantage of the public or to the users of the commodities whose prices are fixed.

" 'Unfair methods of competition' are not determined by so narrow or one-sided a test. It is the harm, which results from destroying the *'fair opportunity'* for competition among competitors which results from a price fixing agreement, created and established by such combination, that makes the action unfair as that term is used in the Act. It is the restriction on the play of competition under normal conditions that presents a case of 'unfair method of competition.' (*F. T. C.* v. *Pacific Paper Assn.*, 273 U. S. 52; *Cal. Rice Industry* v. *F. T. C.*, 102 F. 2d 716, 722.)" (Appendix, pp. 7, 8.)

The first paragraph of the decision of the Circuit Court above quoted indicates that the court considered as the prime question before it, the need to preserve the jurisdiction of the Federal Trade Commission, as it seemed to think otherwise no remedy would exist. It did not consider that, under the facts stated, there was a specific, direct and positive remedy, under the Sherman Act, that was exclusive of any remedy before the Federal Trade Commission.

In its decision above quoted the Circuit Court made no reference to the case of *Federal Trade Commission* v. *Raladam*, 283 U. S. 643, 647, 654, or the same case in 316 U. S. 149, 152, which hold that some competitor must be injured or his business injured by the unfair methods of competition alleged. It was said by this Court in the cases last cited that without such competitive injury the order of the Commission must fail. But the Circuit Court says (App. 8); in substance, that the unlawful agreement to fix prices would be to the injury of the public and the users of the commodities, and this seems in the mind of the Court to over-ride the rule in the Raladam cases, *supra*.

This concept of the law, however, makes two rules: one in which, when unfair methods of competition are alleged in the absence of a conspiracy, there must be the public interest and the injury to the competitor, and the other, when conspiracy is alleged, as constituting unfair methods of competition, no injury to a competitor is necessary—the injury to the public being deemed sufficient—although by the provisions of the act in each instance the complaint will not lie, unless its institution is determined to be in the public interest.

In so holding the Circuit Court has decided a federal question in conflict with the decisions of this Court in *Federal Trade Commission* v. *Raladam*, 283 U. S. 643, 645, 647, 654; *Federal Trade Commission* v. *Raladam*, 316 U. S. 149, 152.

IV.

Fourth Reason Relied on for Allowance of the Writ.

The Circuit Court in its decision relating to subsection 3.1 of Section 3 of Article II of Exhibit 11a and referred to in footnote * * * (App. 3) appears to be in conflict with the decision of this Court in the case of *Sugar Institute* v.

United States, 297 U. S. 553, and especially that part of the opinion appearing on page 601.

The subsection above referred to follows a statement in said exhibit as follows:

> "The practices described below are declared to be unfair and destructive to industry welfare."

Then follows Section 3.1 aforesaid, which is as follows:

> "3.1. Sell, or offer to sell, directly or indirectly, any product of the Section on which price information has been published, at less than the lowest net price published by any member on such product or products; nor sell, or offer to sell, products which are not covered by such price lists but which are similar to listed products, at net prices more favorable to the purchaser than the lowest published net price."

Section 3.1 taken by itself does not in form constitute an agreement. It is only the expression of an opinion. There is nothing in the meeting of June 1, 1936 that indicates that the parties were agreeing to maintain the prices already on file with the section and which had been filed during the Code period, and which they voted not to maintain at the Atlantic City meeting in June, 1935.

The most that can be said is that as a declared policy it would be detrimental to the welfare of the industry to do the things specified in said Section 3.1, but there is nothing therein to prevent the petitioner or any other member of the section from selling at prices different from those quoted by others, if petitioner or other members saw fit so to do.

There was no limitation on the right of the individual to establish his own prices at any time that he might so elect. His determination to sell at a lower price would be concurrent with his establishment of his lower price. There was no restriction or limitation upon individual action such

as appeared in the case of *Sugar Institute* v. *United States*, 297 U. S. 553, 601.

In the Sugar Institute case this Court clearly did not condemn mere price filing, or the making of advance announcements, or the mere filing of such prices with the Sugar Institute. This Court held in that case that the required maintenance of the filed prices, until changed, was a restriction upon individual action, and therefore unreasonable. In said case this Court said, at page 601 of its opinion:

> "The vice in that agreement was not in the mere open announcement of prices and terms in accordance with the custom of the trade * * *. The trial court did not hold that practice to be illegal and we see no reason for condemning it. * * *. The unreasonable restraints which defendants imposed lay not in advance announcements but in the steps taken to secure adherence without deviation to prices and terms thus announced. * * * But in ending that restraint the beneficial and curative agency of publicity should not be unnecessarily hampered.
>
> "* * * On the other hand such provision for publicity may be helpful in promoting competition." (p. 602)

V.

Fifth Reason Relied on for Allowance of Writ.

That the Circuit Court of Appeals has so far sanctioned the departure from the accepted and usual course of judicial proceedings by the Federal Trade Commission in depriving petitioner of a full hearing as required by Section 5 of the Federal Trade Commission Act as to call for an exercise of this Court's power of supervision.

At the hearing before the Commission, it called as a witness one McDonald, an Examining Agent in its employ, who had been directed to investigate the subject

matter of the complaint (R. 458, 459). His testimony given on direct as well as on cross-examination appears in the record at pages 449-466, inclusive.

In the course of his investigation he obtained from the files of other respondents copies of correspondence and documents which he thought showed violations of the Federal Trade Act, as well as those which showed no violations, but all related to the subject of the investigation, were taken at the same time, and all were delivered to the Commission (R. 458, 459). Part of that correspondence and documents so obtained was embraced in Exhibits 155 to 159 inclusive (R. 452; 454; 455; 456) which, over the objection of petitioner, were offered and received in evidence. The remaining portion of such correspondence and documents was retained by the Commission. The originals of all of said correspondence and documents had been lost or destroyed (Thomerson, attorney for the Commission, R. 456) and copies thereof were not available from any other source. (R. 298, 313, 314, 315).

Upon petitioner's request for the production of the additional correspondence and documents above referred to (R. 457), the production thereof was refused by the attorney for the Commission (R. 457), which action was later confirmed by the Commission (R. 97-102).

Petitioner contended before the Commission (R. 97-102) that its refusal to produce the additional correspondence in its possession, after offering part thereof obtained by its witness McDonald, and its refusal to strike the said exhibits from the record, deprived petitioner of the full and complete hearing required by Section 5 of the Federal Trade Commission Act. This contention was also made before the Circuit Court (R. 842) coupled with the additional one that deprivation of said hearing as contemplated by the statute, denied petitioner due process of

law, in violation of the Fifth Amendment to the Constitution of the United States (Brief, Point IV, pp. 57, 93, 94. 95).

The Circuit Court did not pass upon the questions so presented to it by petitioner. It thus sanctioned the action of the Commission.

The refusal of the Circuit Court to pass upon said question appears to be in conflict with the decision of the Sixth Circuit in the case of *Powhatan Mining Co.* v. *Ickes*, 118 Fed. (2d) 105, 108, 109. In that case a substantially similar question was involved. That Court held that the failure and refusal of the Bituminous Coal Commission and its subordinates to produce at the hearing before it, and make a part of the record, pertinent data in its possession based on confidential information received by it, did not accord a full hearing as required by the statute, and constituted a lack of due process.

The refusal of the Circuit Court in this case to pass upon said question also appears to be in conflict with the decisions of this Court in the following cases:

Interstate Commerce Commission v. *Louisville & Nashville Railroad*, 227 U. S. 88, 90, 91, 92, 93. In that case this Court, on page 90 of its opinion, said:

> "In the comparatively few cases in which such questions have arisen, it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair. * * *
>
> "All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal."

Morgan v. *United States*, 298 U. S. 468, 479, 480. In that case, this Court, in considering the duty of the Secre-

tary of Agriculture in the making of rates or charges, on page 480 of its opinion, said:

> "It is a duty which carries with it fundamentally procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion."

Morgan v. *United States*, 304 U. S. 1, 14, 15, 18, 19. This is the same case above referred to, and this Court reaffirmed its prior decision.

On pages 18 and 19 of its opinion, this Court said:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them.
>
> "Those who are brought into contest with the Government in a quasi judicial proceeding aimed at the control of their activities are entitled to be advised of what the Government proposes, and to be heard upon its proposal, before it issues its final command."

Refusal of the Commission to furnish the additional correspondence and documents requested by petitioner was clearly an abuse of power. The Commission, having offered part of the correspondence and documents obtained, was, upon request of petitioner, in duty bound to furnish the remainder.

The concealed correspondence was evidently favorable to petitioner and other respondents. It was not available from any other source. The action of the Commission as aforesaid clearly denied the petitioner a full hearing. The Circuit Court, in refusing to pass upon the contention of petitioner in respect to the same, clearly sanctioned a de-

parture from the accepted and usual course of judicial proceedings, which deprived the petitioner of the full hearing required by the statute, and resulted in a denial of due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

VI.

Sixth Reason Relied on for Allowance of Writ.

The Circuit Court in this case has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter. The decision of said court appearing in the first paragraph (App. p. 7) is in conflict with the following decisions of the Circuit Court of Appeals in other circuits:

Butterick Publishing Co. v. Federal Trade Commission (Second Circuit), 85 Fed. (2) 522, 525, 526, which holds that the Federal Trade Commission is not an agency for the enforcement of the Sherman Anti-Trust Act, and that the Federal Trade Commission Act was in part aimed at the elimination of methods of competition called unfair, *which if left untouched would probably create the evils prohibited by the Sherman Anti-Trust Act.*

American Tobacco Company v. Federal Trade Commission, 9 Fed. (2) 570 involved an order of the Federal Trade Commission under Section 5 of the Federal Trade Commission Act in which the Circuit Court of Appeals for the Second Circuit holds that the question involved in that case was not whether the acts of the American Tobacco Company constituted a restraint of interstate commerce contrary to the Sherman law; that the Commission was not clothed with jurisdiction to hear and determine that question; that its authority to make the order which it entered was restricted to matters of unfair competition (Opinion, p. 586).

United Corporation v. *Federal Trade Commission*, 110 Fed. (2d) 473, 474. In this case the Circuit Court of Appeals for the Fourth Circuit held that the Federal Trade Commission had no power to make a valid order purportedly under Section 5 of the Federal Trade Commission Act, where the activities of the respondent were at the time of the making of the order subject to Sections 202 and 203 of the Packers and Stockyards Act (42 Stat. 161, Secs. 192, 193; 7 U. S. C. A.) under which the jurisdiction to consider such activities had been exclusively given to the Secretary of Agriculture (Opinion, p. 475).

Chamber of Commerce v. *Federal Trade Commission*, 13 Fed. (2d) 673, 685, in which the Circuit Court of the Eighth Circuit held that the Federal Trade Commission had no authority to enter an order on a complaint charging violations of Section 5 of that Act, where the facts alleged brought the subject matter of said complaint within the special jurisdiction of the Secretary of Agriculture under the provisions of the Grain Futures Act (Sec. 1, *et seq.*, Title 7, U. S. C. A.).

Powhatan Mining Co. v. *Harold Ickes, et al.*, 118 Fed. (2d) 105, 108, 109, in which the Circuit Court of Appeals for the Sixth Circuit held that the failure and refusal of the Bituminous Coal Commission and its subordinates to produce at the hearing before it, and make a part of the record, pertinent data in its possession based on confidential information received by it, did not accord a full hearing as required by the statute and constituted lack of due process.

California Lumbermens' Council v. *Federal Trade Commission*, 103 Fed. (2d) 304, 305, in which the Circuit Court of Appeals for the Ninth Circuit held that if petitioners have been deprived of a fair trial, the order of the Commission is invalid as violative of due process.

Conclusion.

For the reasons herein stated, we respectfully urge that this Court, in the exercise of its sound judicial discretion, grant the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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No. 304

In the Supreme Court of the United States

OCTOBER TERM, 1944

EUGENE DIETZGEN CO., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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Federal Trade Commission v. *Raladam Co.*, 283 U. S. 643	7
Federal Trade Commission v. *Raladam Co.*, 316 U. S. 149	8
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United States v. *Socony-Vacuum Oil Co.*, 312 U. S. 150	8
Statute:	
Federal Trade Commission Act, Section 5, 38 Stat. 719	2, 8

605441—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 304

EUGENE DIETZGEN CO., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 991) is reported in 142 F. (2d) 321. The court's opinion on application for rehearing (R. 1012) has not yet been reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered May 22, 1944 (R. 1016). The petition for writ of certiorari was filed July 29, 1944. The jurisdiction of this Court is invoked under

Section 5 of the Federal Trade Commission Act as amended, c. 49, 52 Stat. 111, 15 U. S. C. 45, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 5 of the Federal Trade Commission Act applies to acts which also constitute a violation of the Sherman Act.

2. Whether an agreement to fix and maintain minimum prices is an unfair method of competition within the meaning of Section 5.

3. Whether petitioner was prejudiced or denied a fair hearing by the Commission's refusal to strike from the record copies which one of its investigators had made of certain correspondence of another company, when part of the correspondence in the Commission's file was not made available to petitioner.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, prior to its amendment by the Act of March 21, 1938, 52 Stat. 111, provided in part as follows:

> That unfair methods of competition in commerce are hereby declared unlawful.
>
> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * *, from

using unfair methods of competition in commerce.[1]

STATEMENT

The Federal Trade Commission, in a proceeding begun in 1937 under Section 5 of the Federal Trade Commission Act, entered an order directing Surveying-Drafting-Coaters Section of Scientific Apparatus Makers of America (referred to herein as SDC) and its members to cease from engaging in certain price-fixing activities (R. 1, 10, 826–829). SDC is a trade association composed of companies making products used by surveyors, engineers, and the drafting profession, and, as its name implies, it is one of the sections into which the members of Scientific Apparatus Makers of America, a trade association covering additional lines of activity, are grouped (R. 812–813). Four of SDC's some 40 members filed in the court below petitions for review of the Commission's order (R. 961, 991). Following the court's unanimous approval of the order (R. 991–

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[1] The Commission instituted this proceeding before, but concluded it after, Section 5 was amended by the Act of March 21, 1938, 15 U. S. C. 45. The section as amended provides in part:

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

1006),[2] one of the four petitioners below filed the present petition for certiorari.

The Commission found the following facts:

In June or July 1932 various manufacturers of products used by surveyors, engineers, and the drafting profession agreed to adhere strictly to the prices and other terms of sale shown in a list of prices prepared by the petitioner, Eugene Dietzgen Company, these prices being substantially higher than those at which sales were then being made (R. 815). Between November 1933 and May 27, 1935, the members of SDC conducted their business in accordance with a code of fair competition approved under the National Industrial Recovery Act. When the Act was declared unconstitutional they agreed to continue in force, subject to rewriting "in a legally acceptable form", the code's requirement that price lists be filed with SDC and that no one should sell at lower prices or on more favorable terms than those set forth in his filed price list (R. 816–817).

The substitute rule adopted, as modified in June 1936, was that no sale be made "at less than the lowest net price filed and published by any member" (R. 817–818). Other rules fixed maximum cash discount, prohibited contracts covering a period

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[2] The judgment which the court entered affirmed the Commission's order with a minor clarifying amendment (R. 1016–1019).

of more than one year, and otherwise gave assurance against variation from published prices and terms (R. 818–819). SDC was active in securing observance of its rules (R. 819). As a result of the foregoing agreements and practices, competition between SDC members, who prior to June 1932 were active competitors, has been eliminated (*ibid.*).[3]

The 11 members of SDC named as respondents in the Commission's complaint (including petitioner) have agreed to fix and maintain the prices at which they sell; not to sell at prices or on terms more favorable than those contained in any price list filed with SDC; not to make contracts for a period longer than one year; to fix and maintain uniform terms of sale, including classification of customers and freight allowances; and to file with SDC schedules showing their prices and other terms of sale (R. 823–824). Pursuant to agreement and understanding, members have, in addition, exchanged information among themselves regarding prices and terms of sale to be submitted by them when bids are requested (*ibid.*).

The Commission concluded that these acts and practices constituted unfair methods of competition in interstate commerce (R. 825–826).

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[3] In numerous instances SDC members (sometimes as many as 14 of them) submitted bids identical in amount (R. 820–823).

ARGUMENT

I

Petitioner contends (Br. 6–13) that acts which constitute a violation of the Sherman Act, as those of the SDC members obviously did, are not within the purview of the Federal Trade Commission Act. This Court has held to the contrary. *Federal Trade Commission* v. *Pacific States Paper Trade Ass'n.*, 273 U. S. 52, 61–62, upheld provisions of an order under the latter act directed against price-fixing agreements. In *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 463, also a proceeding under the Trade Commission Act, the Court said that if the practice of a combination "runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition." The Court in that case said (p. 465) that the Commission's findings brought the combination against which its order was directed "well within the inhibition of the policies declared by the Sherman Act itself", and the Court set forth (pp. 465–466) the many respects in which the acts of the Guild members constituted action prohibited by the Sherman Act. See also *Federal Trade Commission* v. *Beech-nut Packing Co.*, 257 U. S. 441, 453–455.

Petitioner states, as we concede, that the Commission is not authorized to enforce the Sherman Act, and petitioner contends (Br. 14–23, 31–32)

that application of the Trade Commission Act to conduct which violates the Sherman Act represents an unauthorized attempt by the Commission to enforce the Sherman Act. But conduct which violates the Trade Commission Act does not cease to be such because it also violates the Sherman Act.[4] A proceeding against such conduct under the former statute is not a proceeding to enforce the latter.

II

Petitioner contends (Br. 23–25) that a combination to maintain minimum prices is not injurious to the competitors of those combining and therefore is not an unfair method of competition within the meaning of the statute. *Federal Trade Commission* v. *Pacific States Paper Trade Ass'n.*, 273 U. S. 52, is a directly contrary holding. Although the point now raised was not discussed in the opinion in that case, it was carefully considered and rejected in *California Rice Industry* v. *Federal Trade Commission*, 102 F. (2d) 716, 720–722 (C. C. A. 9).

Petitioner bases its contention upon *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643.[5] It was there held that the word "competi-

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[4] It is elementary that the same conduct or transaction may be a violation of two statutes and may be prosecuted under both even when both are criminal. *Gavieres* v. *United States*, 220 U. S. 338; *Blockburger* v. *United States*, 284 U. S. 299.

[5] Cf. *Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149.

tion" imports the existence of actual or potential competitors and that the Commission is without jurisdiction to enter an order under Section 5 of the Act in the absence of evidence showing or tending to show the existence of competitors affected by the practices involved in the Commission's complaint. In the present case, however, there is a finding that before the summer of 1932, petitioner and other members of SDC were in active and substantial competition with each other and with other members of the industry, but that since the adoption of the restrictive price-fixing practices, competition has been eliminated (R. 819). Since the *Raladam* case is therefore inapplicable, there can be no doubt that the maintenance of minimum prices by former competitors infringes upon the economic freedom of members of the industry to choose, for example, to sell in greater volume at lower prices.

We submit that it clearly is unfair within the meaning of the statute to use in competition a means or method of trade (price fixing) which Congress in a related federal statute has declared unlawful. *United States* v. *Socony-Vacuum Oil Co.*, 312 U. S. 150, 212. Furthermore, the meaning of the word "unfair" is to be interpreted in the light of the provision in Section 5 that a proceeding may be brought thereunder only if the Commission finds it to be "to the interest of the public". As this Court said in ***Federal Trade Commission*** v. ***Klesner,*** 280 U. S. 19, 27, the purpose of such a proceeding "must be protection of the

public. The protection thereby afforded to private persons is the incident." Surely it is in the public interest to prevent agreements under which lower prices are banned.

III

Petitioner contends (Br. 27–31) that it was denied a fair hearing. The Commission introduced in evidence (Exhibits 155–159) copies of five letters (one written in 1932 and four in 1933) made by an investigator for the Commission from the correspondence files of the Frederick Post Company, an SDC member (R. 452–456). The Commission refused to make available for inspection its file containing copies which the investigator had made of other correspondence of the same company (R. 457–459), and on this ground, petitioner moved to strike the five letters introduced by the Commission. Prior to the Commission's hearing, this company had destroyed its correspondence files for the years 1932 and 1933 (R. 313–315).

Petitioner makes no showing that it was in any way prejudiced by the action to which it objects. Only one of the five letters was to or from petitioner (R. 454) and it may not be presumed in the absence of evidence to the contrary that petitioner did not have this letter, together with any other correspondence pertinent thereto, in its own files. Furthermore, what took place in 1932 and 1933, while of some historical interest, is only remotely relevant to the issue raised by the Com-

mission's complaint, filed in 1937: whether the SDC members were using any unfair methods of competition in interstate commerce. Where, as here, there is no serious challenge to the sufficiency of the evidence to support the findings of the Commission, the matter complained of is merely a minor evidentiary ruling which does not merit review by this Court by way of certiorari. The court below did not consider this matter of sufficient importance to be referred to in its opinion, though it carefully considered seven other issues presented by the petitioners below (R. 991–1006).

CONCLUSION

The ruling below is correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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August 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

(4)

IN THE

Supreme Court of the United States

October Term, 1944.

No. 304

EUGENE DIETZGEN CO.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

REPLY BRIEF OF PETITIONER.

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OCTOBER TERM, 1944.

No. 304.

EUGENE DIETZGEN CO.,
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vs.

FEDERAL TRADE COMMISSION,
Respondent.

REPLY BRIEF OF PETITIONER.

The attempt of counsel for the Commission to state on two pages of their brief a summary of the Commission's voluminous findings of fact, is commendable in the interest of brevity, but gives a picture which in our view does not correctly reflect the salient facts. We believe their brief requires a reply which we shall make as short as possible.

We are unable to understand the relevance or materiality of the opening statement in respondent's brief on page 4 referring to the alleged agreement as to prices in 1932, in view of the later statement (p. 9) that

> "what took place in 1932 and 1933, while of some historical interest, is only remotely relevant to the issue raised by the Commission's complaint, filed in 1937: whether the SDC members were using any unfair methods of competition in interstate commerce."

The statement (p. 4) that:

> "When the Act was declared unconstitutional they agreed to continue in force subject to rewriting 'in a legally acceptable form,' the code's requirement that price lists be filed with SDC and that no one should sell at lower prices or on more favorable terms than those set forth in his filed price lists (Rec. 816-817),"

is not in accord with paragraph 8 of the Commission's findings of fact (R. 817) which refers to what took place after Section 3 of the National Industrial Recovery Act had been declared unconstitutional.

Secondly, it is not in accord with paragraph 7 of the Commission's findings of fact (R. 816) as to the matters and things that petitioner and others were required to do and perform during the period the National Industrial Recovery Act, code and supplemental code were in effect.

Lastly, said statement is not in harmony with the actual fact as to what took place at Atlantic City following the decision of this Court in *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, and referred to in paragraph 8 of the Commission's finding of fact (R. 817), and said finding of fact does not accord with paragraph 29 of the stipulation of facts entered into by petitioner and respondent as to the action of the SDC Section taken at its meeting on June 3, 1935, at Atlantic City. (R. 141, 142.)

The code under the N. I. R. A. offered in evidence (Exhibit 2) is the same as Exhibit A attached to the answer of petitioner before the Commission (R. 30 to 39). Article I stated the purposes of the Code; Article II contained the definitions of the industry, employee, employer and member of the industry; Article III covered hours of service; Article IV, wages; Article V, general labor provisions; Article VI, related to administration; Article VII, trade practices, and Article VIII, provision as to modification.

The supplemental code under the N. I. R. A. (Exhibit 4)

applied only to the SDC Section and it superseded Article VII of the code relating to trade practices. The matters and things set forth in paragraph 27 of the stipulation (R. 140, 141) which were required to be done by the members of the SDC Section under the N. I. R. A. were in the beginning required under the direction of the Manager, pursuant to the provision of Section 2 of Article VII of the code. After the adoption of the supplemental code, Exhibit 4 (par. 22, Stip. R. 138), the matters and things set forth in paragraph 27 of said stipulation (R. 140, 141), required of the members of the Section were based upon directions of the Manager in accordance with the provisions of the supplemental code and paragraph 12 of said supplemental code (Ex. 4) related to prices and price filings.

As shown by paragraph 29 of the stipulation (R. 141), after the N. I. R. A. the provisions of the code agreed to be observed had no relation to prices or price filings.

Paragraph 12 of Exhibit 4, which related to prices and price filings was not agreed to be observed. It was discontinued for the purpose of rewriting and further submission to the Section by the Executive Committee (Stip. par. 29, R. 141, 142). This paragraph of Exhibit 4 was never rewritten or resubmitted to the Section. At its meeting on June 1, 1936, the question was presented in a totally different form, as shown in paragraph 10 of the Commission's findings of fact (R. 818).

In this provision so adopted *price filing* was wholly eliminated.

The further statement appearing in the last paragraph on page 4 of said brief,

> "the substitute rule adopted, as modified in June 1936, was that no sale be made 'at less than the lowest net price *filed and published* by any member' (R. 817-818)" (Italics supplied),

is quoted from the finding of fact relating to the October

29, 1935 meeting (Par. 9, R. 817), and is not as stated in the brief the rule adopted in June, 1936.

The quotation in the brief refers to a proposed rule which is quoted in paragraph 9 of the Commission's findings of fact (R. 817) which was tentatively considered by the SDC Section as a part of the proposed code for the entire industry at Cleveland on October 29, 1935 (Exhibit 9; Stip. par. 30; R. 142), but which it was stipulated was never adopted (Stip. par. 30, R. 142).

It is sub-section 4.1 of Article VII of Exhibit 9, a proposed code for the entire industry. Even if said code had been adopted and approved (which it was not), Article I thereof provided that the same would not bind any individual member of the industry, unless he gave his *written* approval or assent thereto, and petitioner never gave such written approval or assent (Ex. 9, Art. I, Examiners Orig. Rept. Par. 39, R. 676; Examiners Supp. Rept. Par. 39, R. 783; Allin R. 586, 587).

The respondent in its brief in the Circuit Court of Appeals on page 29 conceded that the rule a portion of which is quoted in Respondent's brief (p. 4), was never adopted or effective. It said:

> "It will be noted that the Rules of Fair Competition adopted by the Section on June 1, 1936 (Com. Ex. 11A), were not merely 'proposed' rules, as were those approved by the Section at the October 29, 1935 meeting (Com. Ex. 9), and were not a 'supplementary' code such as Commission's Exhibit 9A. * * * The 1936 Rules were *adopted* by the Section, not merely approved, as were the 1935 Proposed Rules."

There is a marked difference between the rule adopted at the meeting in Chicago on June 1, 1936, quoted in paragraph 10 of the Commission's findings of fact (R. 818), and the rule quoted in part in Respondent's brief and in full in paragraph 9 of the Commission's findings of fact relat-

ing to the October 29, 1935, meeting (R. 817), but which was never adopted (Stip. 30; R. 142).

The provision quoted in Respondent's brief and erroneously stated to have been adopted in June 1936, relates to prices *filed and published*, while the provision in fact adopted June 1, 1936 (findings of fact par. 10, R. 818) relates only to *published* prices, and the price filing provisions of paragraph 12 of the supplemental code, Exhibit 4, were wholly eliminated.

The language appearing on the top of page 5 of Respondent's brief "and otherwise gave assurance against variation from published prices and terms (R. 818-819)" is only a conclusion of counsel. It is not a statement of fact that is supported by any finding of fact on the pages of the record cited in said quotation.

The statement in Respondent's brief (p. 5) that "SDC was active in securing observance of its rules, (R. 819)", must relate in time to the period when the code Exhibit 2, and the supplemental code Exhibit 4 were in effect under the N. I. R. A. as there is nothing in the portion of the record cited that indicates the SDC Section did anything whatsoever in regard to the complaint of the individual member to which the Commission alluded on the page of the record cited above in Respondent's brief.

The statement (p. 5) that

> "The 11 members of SDC named as respondents in the Commission's complaint (including petitioner) have agreed to fix and maintain the prices at which they sell; not to sell at prices or on terms more favorable than those contained in any price list *filed with SDC* * * * and to file with SDC schedules showing their prices and other terms of sale (R. 823-824)" (Italics supplied).

conveys the impression that the "11 members" made some agreement other than that already referred to in Respond-

ent's brief, while the finding of fact cited in support (R. 823-824) refers to the agreements in paragraphs 6, 8, 9 and 10 of the findings of fact which have already been referred to in the previous statements in the brief.

Furthermore, subparagraph (f) of paragraph 13 of the Commission's findings of fact (R. 824), concerning price filing, must refer to price filings on blue print papers and cloths made with the SDC Section during the time the code (Exhibit 2) and supplemental code (Exhibit 4) were in effect under the N. I. R. A., which filings were required by that Act.

The undisputed testimony of the witness Parker, Manager of the SDC Section, shows that the only price filings were on blue print papers and cloths, and that no price filings were made subsequent to May 27, 1935, the date Section 3 of the Act was declared unconstitutional by this Court. (Parker, R. 542-551.)

ARGUMENT.

I.

In answering petitioner's contention that acts which constitute a violation of the Sherman Act, are not within the purview of the Federal Trade Commission Act, respondent contends that this Court has held to the contrary, and cites *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, 61-62. Respondent further states that this Court in that case upheld provisions of an order under the latter Act directed against price fixing agreements. Petitioner does not dispute that this Court upheld the order in that case. Petitioner's contention under Reason I for the issuance of the writ is that this Court had never decided the question presented in this case in any case where that question had been specifically raised. That it was not raised in the *Pacific States Paper Trade Association* case, is definitely admitted by respondent on page 7 of its brief.

In fact as pointed out in our brief, there is no mention in the opinion in that case of either the Sherman Act or the Clayton Act.

A case in which the question here presented was not raised, discussed or passed upon cannot properly be held *stare decisis* in a later case where the question is definitely raised and presented for decision.

Respondent also cites in support of its contention *Fashion Originators Guild* v. *Federal Trade Commission*, 312 U. S. 457, 463. The petitioner has fully analyzed this case in its brief filed in support of its petition for the writ (pp. 7-11). We merely reassert that the *Fashion Guild* case did not decide the question here involved and presented by the peti-

tion. This Court in the *Fashion Guild* case did not have before it the question now presented, nor was it discussed.

Respondent cites (p. 6) *Federal Trade Commission* v. *Beechnut Packing Company*, 257 U. S. 441, 453-455. On page 11 of its brief, petitioner has fully analyzed said case.

We contend here, as we contended in our brief in support of the petition, that this Court did not in the *Beechnut* case, *supra*, decide the question stated under Reason I in the petition for the allowance of the writ.

Respondent on page 6 of its brief concedes that it is not authorized to enforce the Sherman Act. On page 7 of its brief, however, respondent states:

> "The conduct which violates the Trade Commission Act does not cease to be such because it also violates the Sherman Act."

In support of this contention respondent cites in a footnote on page 7 the cases of *Gavieres* v. *U. S.*, 220 U. S. 338, and *Blockburger* v. *U. S.*, 284 U. S. 299. In our view neither of these cases has any application to the question involved. In each of the cases cited the ordinances and statutes involved made the same acts different crimes with jurisdiction to enforce granted to a court in each instance. We do not controvert the rule announced in these cases. The question presented by the petition, in the instant case, however, is not within the said rule.

The Sherman Act specifically vests jurisdiction in the District Court of the United States to enforce its provisions. An administrative tribunal, such as respondent, cannot under the guise of preventing unfair methods of competition charge completed and continuing violations of the Sherman Act and thus assume the jurisdiction of the District Courts to enforce the provisions of said Act. To permit respondent to do so would extend to it the power and

jurisdiction of a court with authority to determine that the Sherman Act *had been* violated, a power which cannot be constitutionally granted to it because it is not a court. It cannot usurp the jurisdiction specifically vested in the District Court by that Act.

In the two cases cited by respondent and above referred to, each ordinance and statute involved defined the separate offenses. The Sherman Law definitely defines violations thereof and prescribes the civil and criminal remedies. *There is no definition of unfair methods of competition in the Federal Trade Commission Act.*

The strictness with which statutory jurisdiction of a court or administrative tribunal *as to remedy* must be observed, is well illustrated by the case of *United States Navigation Company* v. *Cunard Steamship Company*, 284 U. S. 474. In that case the Navigation Company brought suit in the District Court for the Southern District of New York to enjoin respondents from continuing an alleged combination and conspiracy in violation of the Sherman Anti-Trust Act, 15 U. S. C. A. Secs. 1-7, and of the Clayton Act, Title 15, U. S. C. A. Secs. 12-37.

The District Court sustained a motion to dismiss on the ground that the matters complained of were within the exclusive jurisdiction of the United States Shipping Board, under the Shipping Act of 1916, 39 Stat. Ch. 451, as amended by the Merchant Marine Act of 1920, Ch. 250, 41 Stat. 988 (46 U. S. C. A. Secs. 801-842). The Circuit Court of Appeals of the Second Circuit affirmed the action of the District Court (p. 478).

This Court on page 480 of its opinion in the above case stated in substance, that giving consideration alone to the Sherman Anti-Trust Act, the bill stated a cause of action under Sections 1 and 2 of that Act and furnished the ground

for an injunction under Section 16 of the Clayton Act, *unless the Shipping Act of 1916 stood in the way.*

This Court held that the Shipping Act of 1916 as amended by the Merchant Marine Act of 1920 as aforesaid, gave to the United States Shipping Board exclusive primary jurisdiction to determine whether or not the agreements and combinations complained of in the bill as violative of the Anti-Trust Act were unlawful or discriminatory under said Shipping Act and said Merchants Marine Act.

This Court further said in substance (Opinion 485, 486) that the *remedy* for the charges in the bill was that afforded by the Shipping Act, which to that extent superseded the Anti-Trust laws.

At the time of the filing of the bill in the above case, the exclusive remedy before the Shipping Board for the acts complained of had not been invoked. This Court in said case clearly determined from the matters pleaded in the bill that the exclusive jurisdiction of the remedy was in the Shipping Board.

The complaint in the present case charges acts (Pars. 7, 8, R. 6, 7) which if true are in fact complete and continuing violations of the Sherman Act, and not only the charges but the Commission's findings of fact are worded in almost the exact language of that Act. (Par. 20, R. 825.) The Department of Justice had not at the time instituted a proceeding in the District Court which had exclusive jurisdiction over the remedy for the acts complained of before the Commission. This brings the instant case definitely within the rule as announced in the *Navigation Company* case, *supra.*

The real question in the instant case as to the jurisdiction is: Where does the remedy lie for the acts complained of?

The remedy for such acts is vested exclusively in the District Court.

Jurisdiction of the remedy is the question decided by this Court in the *Navigation Company* case, *supra.*

In a more recent case this Court announced and applied the same rule.

> *Armour & Co.* v. *Alton Railroad Co. et al.*, 312 U. S. 195.

In the two cases cited the jurisdiction of the District Court to entertain the remedy was denied, because the remedy therefor was by the respective statutes specifically confided to the respective administrative bodies therein referred to. Those cases are even stronger than the present case. In the present case, the jurisdiction to enforce the provisions of the Sherman Act is exclusively vested in the District Court, and there is no provision in the Federal Trade Commission Act vesting jurisdiction in it as to matters within the scope of the Sherman Act.

Petitioner earnestly asserts that the present case is clearly within the doctrine announced by this Court in the cases last referred to. As fully shown in our brief, it seems clear that Congress, in enacting the Federal Trade Commission Act, intended to reach activities that were not within the scope of the Sherman Act.

II.

Respondent under point II of its brief (p. 7) does not correctly state the contention of petitioner set forth in its brief in support of the writ, pages 23-25. In the pages of petitioner's brief referred to, the contention is that in order to show unfair methods of competition under Section 5 of the Federal Trade Commission Act, it must also be shown that there is competition and that someone engaged in the industry involved must be injured or injuriously affected in his business by the unfair competi-

tion of competitors. In the present case the Commission charged and found that by the acts complained of petitioner and other respondents before the Commission had entirely eliminated competition in the industry.

We contended that in the absence of competition injurious to one engaged in such industry or injuriously affecting his business, unfair methods of competition under Section 5 of the Federal Trade Commission Act did not exist; that in the absence of competitors there could be no competition; that competition must be shown to permit a determination that it was unfair; that competition to be unfair must injuriously affect some competing member of the industry and cited in support of this contention *Federal Trade Commission* v. *Raladam*, 283 U. S. 643, 645, 647, 654, and *Federal Trade Commission* v. *Raladam*, 316 U. S. 149, 152.

Respondent, in support of its erroneous statement as to petitioner's contention, cites *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, as a holding directly contrary to said incorrect statement of petitioner's contention. This case does not hold that a combination to maintain minimum prices, not injurious to competitors of those combining was an unfair method of competition within the meaning of the Federal Trade Commission Act. The question as stated by respondent was not involved in the *Pacific States Paper Trade Association* case. The question of other competitors and whether the unfair methods of competition had an injurious effect, was not called to the attention of the Court. Neither the Sherman Act nor the Clayton Act were referred to in that case.

Furthermore, *Federal Trade Commission* v. *Raladam*, 283 U. S. 643, which announced the necessity for competitors or competition and that such competition should not

only be unfair but should be injurious to others engaged in the business, had not been decided at the time of the decision in the *Pacific States Paper Trade Association* case. Respondent, however, concedes on page 7 of its brief that the point actually raised by petitioner was not discussed in the *Pacific States Paper Trade Association* case.

In the case of *California Rice Industry* v. *Federal Trade Commission*, 102 F. (2d) 716, 720-722 (C. C. A. 9), the question of the jurisdiction of the Commission to charge complete violations of the Sherman Act and then declare the same to constitute unfair methods of competition, was not raised.

On page 8 of its brief respondent states in substance, that the finding in this case that in the summer of 1932 petitioner and other members of SDC were in active and substantial competition with each other and with other members of the industry, but that since the adoption of the restrictive price fixing practices competition has been eliminated, takes this case out of the rule announced in the *Raladam* case *supra*. Petitioner on page 24 of its brief has fully answered this contention of respondent.

In addition, it should be observed that the alleged elimination of competition was not the result of the alleged conspiracy of 1932, but was legally sanctioned by the code (Exhibit 2) and supplemental code (Exhibit 4) covering a period from November 14, 1933 (the effective date of the code), and continuing under the supplemental code (Exhibit 4), *at least* until May 27, 1935, the date that this Court declared Section 3 of N. I. R. A. to be invalid.

During the period mentioned, under Section 5 of N. I. R. A. (48 Stat. Ch. 90, Sec. 5, 195) neither the courts nor the Federal Trade Commission had the lawful power to institute a proceeding involving any acts done pursuant to said code (Exhibit 2), or the supplemental code (Ex-

hibit 4), claimed to violate any of the anti-trust laws. Such activities, as well as the parties thereto, were by said Section 5 aforesaid, given complete exemption from the provisions of the anti-trust laws. The record shows that subsequent to May 27, 1935 and beginning on June 3, 1935, the SDC Section wholly abandoned the former provision of Exhibit 4, paragraph 12, thereof, which related to price filing and price maintenance. (Stip. par. 29, R. 141, 142, 817); that subsequent to and up to June 1, 1936 no action was taken by the petitioner or the SDC Section that resulted in the final adoption of any rule or regulation pertaining to price filing or price maintenance, (Stip. par. 30, R. 142; par. 9, R. 817). It was not until June 1, 1936 that any definite action was taken by petitioner and the SDC Section for the establishment of a rule pertaining to prices, and that rule eliminated *price filing* and related only to *price publication* by the individual members of the Section, (Stip. par. 31, R. 142, 143; par. 10, R. 818). All activities of petitioner and the SDC Section beginning on June 3, 1935, and continuing to June 1, 1936 and thereafter, were undertaken by them in good faith attempts to comply with the President's request for voluntary code observance, Exhibit 6 (Stip. R. 141; Roberts, R. 324, 326, 327). Hence, there can be no relation between the activities complained of prior to June 1, 1936 and those which took place on and after that date. This contention of petitioner is in substance conceded by respondent on pages 9 and 10 of its brief.

U. S. v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 212, a proceeding instituted under the Sherman Act, is cited by respondent on page 8 of its brief in support of its contention that it is clearly unfair within the meaning of the Federal Trade Commission statute, to use in competition a means or method of trade such as price fixing which is made unlawful under the Sherman Act. But the case cited

does not decide that question. It merely decided that price fixing agreements duly entered into were unlawful under the Sherman Act. This was a decision by a court having judicial power to determine that said Act had been violated. These agreements were complete at the time the court assumed jurisdiction in that case. We doubt that respondent would now contend that it could, during the pendency of the *Socony* case, or thereafter have instituted a complaint under Section 5 of the Federal Trade Commission Act alleging that the identical acts before the court constituted unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

The case of ***Federal Trade Commission*** v. ***Klesner,*** 280 U. S. 19, 27, cited by respondent on page 8 of its brief, has no application to the question presented to this Court.

III.

Under respondent's point III it refers to petitioner's Reason V for the writ. The contention of petitioner is that it was denied a fair hearing before the Commission. Respondent does not really meet the contention of the petitioner. The investigator of the Commission testified that at the time he obtained the documents in question (Exhibits 155-159) he at the same time and as a part of the same investigation, obtained other correspondence which showed no violations of law. (R. 459.) Respondent having introduced the exhibits in question, petitioner, on the statement of the Commission's investigator coupled with proof that all of the correspondence in the files investigated had been destroyed and the same were not available to petitioner from any other source, asked the Commission to produce such other correspondence that its investigator had testified was then in the possession of the

Commission. The Commission declined to furnish or produce any of such other correspondence. (R. 457.)

Respondent now says that petitioner has made no showing that it was in any way prejudiced by such action of the Commission. The contents of the correspondence no one knows except the Commission. Its materiality or relevancy could only be determined upon its production. Whether it would have been beneficial to petitioner and the other respondents could only be definitely ascertained upon the production of such other correspondence.

The presumption, however, is strong that the Commission having such correspondence in its possession, would have presented the same with the other exhibits, if it had thought that the same constituted any evidence of law violation. The fact that the investigator stated that he took all correspondence bearing on the nature of the investigation whether it showed law violations or not, gives rise to the presumption that it may have furnished some proper explanation of the matters and things set forth in the correspondence included in the exhibits offered by the respondent. Whether or not the correspondence which respondent refused to disclose would have been beneficial, is really beside the point. The fact is that any governmental administrative agency, such as respondent, in conducting a hearing, is governed by rules of administrative conduct which must always embrace fair dealing with the parties before it.

When it offers at a hearing correspondence or documents obtained by one of its investigators in the course of an investigation, it violates the rule of fair play, and fails to grant a full hearing, when it denies to an interested party access to such other correspondence in its possession, obtained in the same investigation by the same investigator,

and instead actually conceals the same, and places it beyond the reach of the interested party.

Respondent also seems to have misapprehended somewhat the scope of our contention in this respect. One of the five letters in the exhibits was a copy of a letter to a representative of the petitioner. Our contention is not as to the correspondence embraced within the exhibits offered, and produced. It goes to the correspondence obtained at the same time by the Commission, which it has steadfastly refused to produce upon the request of petitioner, and which it has at all times concealed. We think its action is clearly in conflict with the decision of the Circuit Court of Appeals of the 6th Circuit in *Powhatan Mining Company* v. *Ickes, et al.*, 118 Fed. (2d) 105, 106, 109, cited on page 32 of petitioner's brief.

Since the respondent in its brief (p. 10) states there is no serious challenge to the sufficiency of the evidence to support the Commission's findings, it seems appropriate to make response thereto.

It is petitioner's understanding that a discussion of the insufficiency of the evidence to support a finding is not permissible upon a petition for the issuance of a writ of certiorari. However, on pages 18-20 of the petition for the writ petitioner states the questions presented, and question 5 challenges the sufficiency of the evidence to support the findings, and further that the findings are contrary to the undisputed evidence of record. Should this writ be granted and the case heard on its merits, petitioner would earnestly and in good faith urge that the Commission's findings are not only not supported by valid evidence, but that the same are contrary to the undisputed evidence of record.

Conclusion.

Petitioner earnestly contends that the issuance of the writ as prayed for is justified under each of the several reasons for the issuance of the writ as set forth in the petition therefor.

Respectfully submitted,

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